Commenters suggested that § 9901.607(a)(3) be revised to provide that performance receive the same or no greater retention weight than creditable service. This suggestion was not adopted. Consistent with the Department's personnel system that emphasizes performance, § 9901.607(a)(3) provides that performance receives greater weight as a retention factor than creditable service.

A commenter suggested that performance receive less weight under subpart F than veterans' preference. As previously noted, §§ 9901.607(a)(2) and (a)(3) provide that veterans' preference is considered as a retention factor before performance under subpart F.

Commenters suggested that § 9901.607(a)(3) be revised to increase the relative weight of performance over veterans' preference as a retention factor. This suggestion was not adopted. Section 9901.607(a)(2) considers veterans' preference on the same basis as under OPM's regulations determining RIF retention standing, while § 9901.607(a)(3) provides less weight to performance than veterans' preference as a retention factor.

Commenters suggested that subpart F provide retention credit for performance on the same basis as OPM regulations. This suggestion was not adopted. The additional weight for performance as a retention factor under subpart F is consistent with the increased emphasis on performance in the Department's new personnel system.

Commenters, including labor organizations participating in the meet-and-confer process, were concerned that § 9901.607(a)(4) excessively decreases the relative weight of creditable service as a retention factor under subpart F. Section 9901.607(a)(4) considers service as the fourth and least important retention factor. Under OPM's RIF regulations, service is the third most important retention factor, while performance receives the least weight as a factor. Again, the decreased retention weight on service and the additional weight for performance are consistent with the increased emphasis on performance in the Department's performance-based personnel system.

A commenter suggested that subpart F clarify ''length of service.'' Section 9901.607(a)(4) provides that employees receive retention credit for creditable civilian and Armed Forces service on the basis of 5 U.S.C. 3502(a)(A) and (B), and OPM's regulations in 5 CFR 351.503. However, we believe that clarification is necessary. We revised § 9901.607(a)(4) to provide that in calculating creditable civilian and uniformed service under subpart F, the Department uses 5 CFR 351.503 of OPM's RIF regulations, but without regard to provisions covering additional service credit for performance in 5 CFR 351.503(c)(3) and (e) of OPM's regulations. The Department will publish implementing issuances clarifying RIF service credit under subpart F.

In a clarifying edit, we added § 9901.607(a)(5), which provides that the Department may establish tie-breaking procedures when two or more employees have the same retention standing. This sentence was included in § 9901.607(a)(4) of the proposed regulations.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.607(c) be revised to provide that all employees have access to a retention list established under § 9901.607(a)(1). We did not adopt this suggestion because § 9901.607(c) provides that employees who have received a specific written RIF notice have access to a retention list in accordance with 5 CFR 351.505 of OPM's RIF regulations. However, we believe that clarification is necessary. We revised § 9901.607(c) to provide that in allowing access to retention records, the Department uses section 5 CFR 351.505 of OPM's reduction in force regulations, but substitutes ''retention list'' for ''competitive level'' or ''retention register.'' The Department will publish implementing issuances clarifying access to retention lists under 9901.607(c).

Section 9901.608—Displacement, Release, and Position Offers

Section 9901.608 covers personnel actions that result in displacement within the retention list or the release of an employee from a retention list under subpart F. A qualified employee reached for release from his/her present position because of position abolishment or displacement by a higher-standing employee on the retention list may potentially displace a lower-standing employee on the list before separation or furlough by RIF.

A commenter suggested that § 9901.608(a) be revised to clarify how the Department determines that a higher-standing employee is qualified to displace a lower-standing employee on the retention list. Another commenter suggested that § 9901.608(a)(1)(i) be revised to eliminate a requirement that the Department only uses 5 CFR 351.702 of OPM's retention regulations to determine employees' qualifications for displacing a lower-standing employee on the retention list under subpart F. We agree that clarification is necessary. We revised § 9901.608(a)(1)(i) to provide that in determining the qualifications of a higher-standing employee to displace a lower-standing employee under subpart F, the Department uses, as applicable, 5 CFR 351.702 of OPM's retention regulations, or its own qualifications, consistent with other requirements in 5 CFR 351.702. The Department will publish implementing issuances clarifying qualification determinations for displacement within a retention list under § 9901.608(a). We also added § 9901.608(a)(1)(iii) to clarify that a displaced employee must be in the same or lower pay band as the higher-standing employee who displaced him/her.

Commenters suggested that § 9901.608(a) be revised to clarify terminology such as ''status'' and ''undue interruption.'' The Department will publish implementing issuances clarifying terminology under 9901.608(a).

A commenter suggested that § 9901.608(a) be revised to require the Department to provide positive efforts that would increase the likelihood of higher-standing employees being qualified to displace employees with lower retention standing. We did not adopt this suggestion. We believe it would be unfair for the Department to pursue a program whose purpose is to increase the likelihood of one category of employees displacing a different category of employees in a RIF.

Commenters suggested that § 9901.608(b)(1) be revised to clarify the order in which employees are released from the retention list. Section 9901.608(b)(1) provides that, consistent with the order of retention required by § 9901.607(a), employees with the lowest retention standing are released before higher standing employees on the retention list.

Commenters also suggested that § 9901.608(b)(2) clarify displacement rights involving time-limited positions. We agree that clarification is necessary. We revised § 9901.608(b)(2) to provide that under subpart F a competing employee may not be released from a retention list containing a position held by a temporary employee when the competing employee is qualified for the position under § 9901.608(a)(1)(i). The Department will publish implementing issuances clarifying release from retention lists under 9901.608(b).

A commenter suggested that § 9901.608(b) clarify the procedures that the Department uses to break ties in employees' relative retention standing. The Department will publish implementing issuances clarifying tie-

breaking procedures in releasing employees from retention lists. Section 9901.607(a)(5) of the final regulations covers the Department's right to establish tie-breaking procedures.

A commenter suggested that § 9901.608(b)(3) clarify how the Department will use exceptions to the regular order of release from the retention list. We agree that clarification is necessary. We revised § 9901.608(b)(3) to provide that in temporarily postponing the release of an employee from the retention list, the Department uses 5 CFR 351.506, 351.606, 351.607, and 351.608 of OPM's RIF regulations, but substitutes the term ''retention list'' for the term ''competitive level'' where part 351 uses that term in the four identified sections. The Department will publish implementing issuances further clarifying exceptions to the usual order of release under § 9901.608(b)(3).

Commenters suggested that § 9901.608(c) clarify whether the Department will consider employees' retention standing in offering vacant positions under subpart F. We agree that clarification is necessary. Section 9901.608(c) provides that the Department must use retention standing in offering a vacant position in the same competitive area to an employee released from a retention list under subpart F. We revised § 9901.608(c) to clarify that the Department must use retention standing when offering a vacancy in the same competitive area to an employee who is competing on the retention list under § 9901.608(a)(1) because of either position abolishment or displacement by an employee with higher retention standing. The Department will publish implementing issuances clarifying offers of vacancies under § 9901.608(c).

A commenter asked whether a released employee who is offered a vacancy under § 9901.608(c) has any potential rights to pay retention. The Department will publish implementing issuances clarifying employees' entitlements to pay retention under § 9901.608(c). However, in a conforming change, we have revised § 9901.355 of subpart C to provide additional information on pay retention.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.608(d) be revised to provide that, in lieu of RIF separation or furlough, an employee released from a retention list would have potential displacement rights to positions held by lower-standing employees on other retention lists similar to ''bump'' and ''retreat'' regulations provided to released employees under subpart G of part 351 of OPM's RIF regulations. This suggestion was not adopted. Section 9901.608(d) provides the Department with flexibility to restrict RIF actions to organizations and positions directly affected by organizational decisions such as realignment, reorganization, and closure. In a related clarification, we revised § 9901.608(d)(2) to provide that the furlough of an employee released from a retention list is covered by § 9901.604(b)(3). The Department will publish implementing issuances clarifying actions following the release of employees from a retention list under § 9901.608(d).

Section 9901.609—Reduction in Force Notices

Section 9901.609 covers the notice that the Department must issue to each employee before release from the retention list under subpart F. The Department must issue a specific written notice a minimum of 60 days before the employee is reached for release from the retention list by a RIF action (*e.g.*, separation or furlough).

Commenters suggested that § 9901.609 be revised to provide 120 days written notice. This suggestion was not adopted. The requirement for a minimum 60 days notice of a RIF action is consistent with the requirements of 5 U.S.C. 3502(d)(1)(A) for OPM's regulations published in 5 CFR 351.801(a)(1). The Department will publish implementing issuances clarifying the content of RIF notices issued under § 9901.609.

In a clarifying change consistent with management flexibilities provided by 5 CFR 351.801(b), § 9901.609 is revised to provide that when the Department applies subpart F because of circumstances not reasonably foreseeable, the Secretary, at the request of a component head or designee, may approve a RIF notice period of less than 60 days. The notice period must cover at least 30 days before the date of release from the retention list. The Department will publish implementing issuances covering a RIF notice period of less than 60 days under § 9901.609.

Section 9901.610—Voluntary Separation

Section 9901.610 covers voluntary separation from the Department as a RIF action. Under this option, the Department may allow an employee to volunteer for separation from the service by reduction in force when the action avoids the RIF separation of another employee.

One commenter suggested that the Department use the voluntary separation option to avoid RIF actions. The Department will publish implementing issuances clarifying the applicability of voluntary RIF separations under § 9901.610.

Section 9901.611—Reduction in Force Appeals

Section 9901.611 covers RIF appeals. An employee who is reached for a RIF action resulting in separation, reduction in band, or furlough under § 9901.604(b), and who believes that the Department improperly applied subpart F, has the right to appeal to the Merit Systems Protection Board. Also, commenters during the meet-and-confer process suggested, as an alternative to appealing RIF actions to the Board, employees should instead have the right to file a grievance. We did not adopt this suggestion. Section 9901.611(a) references 5 CFR 351.901 of OPM's regulations in providing the same impartial right to appeal a RIF action under subpart F as provided to an employee under OPM's retention regulations.

For clarification, we revised § 9901.611(a)(3) to provide that an employee has the right under subpart F to appeal a furlough of more than 30 days, as defined in § 9901.604(b)(3).

Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.611(a) be revised to provide a right to appeal a RIF action under subpart H of part 9901 (''Appeals''). This suggestion was not adopted. Subpart H of part 9901 only covers appeals of certain adverse actions taken under subpart G of part 9901 (*e.g.*, removals, suspensions for more than 14 days, furloughs of 30 or less consecutive days, and reductions in pay band—or a comparable reduction). The procedures in subpart H are appropriate for reviewing an adverse action appeal (*i.e.*, an appeal of a personnel action that the Department took for cause). In contrast, § 9901.611(a) provides for the right to appeal a RIF action (*i.e.*, an appeal of a personnel action that the Department took for an organizational reason) on the same basis as under OPM's RIF regulations.

Commenters suggested revision of § 9901.611(a) to provide for expedited Board review of appeals under subpart F. This suggestion was not adopted. Section 9901.611 provides for the right to appeal a RIF action to the Board using the same procedures as an appeal under OPM's regulations.

Commenters, including labor organizations participating in the meet-and-confer process, suggested revision of § 9901.611(b) to provide for the right

to appeal to the Board, or another third-party appellate body, an action taken under internal Department placement programs. This suggestion was not adopted. Section 9901.611(b) does not provide the right to appeal an internal placement action (including a placement under the Priority Placement Program). An employee who believes that the Department failed to properly effect an internal placement action may contest the action through a grievance or other remedy available for the review of the Department's internal staffing decisions.

Subpart G—Adverse Actions

General Comments

Many commenters, including labor organizations participating in the meet-and-confer process, objected to the provisions in subpart G. They felt that the proposed regulations would adversely impact due process rights, discrimination and whistleblowing claims, and the ability to retain staff. We disagree. Under the enabling legislation, DoD is prohibited from waiving or modifying any provision relating to prohibited personnel practices or merit system principles, including reprisal for whistleblowing or unlawful discrimination. The regulations therefore do not modify these protections in any way. The enabling legislation also requires DoD to ensure that employees are afforded the protections of due process, which we have done. In accordance with U.S. Supreme Court decisions, the regulations ensure employees notice, a right to reply, a final written decision, and a post-decision review when the Secretary proposes to deprive them of constitutionally protected interests in their employment. Although we have made changes to the proposed regulations, due process and other legal protections are preserved as required by Congress, and we do not believe the regulations in this subpart will have any negative effect on retention efforts.

Section 9901.701—Purpose

This section outlines the purpose of this subpart and provides for the development and publication of DoD implementing issuances. During the meet-and-confer process, the participating labor organizations stated that DoD does not have the authority to prescribe implementing issuances to carry out the provisions of this subpart. We disagree. The enabling legislation expressly states that the Secretary and the Director will jointly prescribe regulations for the system. This carries with it the authority for the Secretary to provide further clarification, guidance, and instruction on these regulations through implementing issuances. It is also consistent with the continuing collaboration process described in § 9901.106 which implements 5 U.S.C. 9902(f)(1)(D).

Section 9901.702—Waivers

This section specifies the provisions of title 5, U.S. Code, that are waived for employees that are covered by the NSPS adverse action system established under subpart G. During the meet-and-confer process, the participating labor organizations recommended that this provision be deleted. We do not agree with this recommendation because it is inconsistent with the enabling legislation, which allows waiver of certain provisions of title 5, U.S. Code, and the creation of new adverse action procedures. We have made no changes to this section.

Section 9901.703—Definitions

This section defines terms relevant to this subpart. The labor organizations participating in the meet-and-confer process recommended that the definition of ''adverse action'' be amended to include ''demotion'' and exclude the words ''or other comparable reduction.'' We disagree. The term ''demotion'' is not used in the regulations. The concept of demotion is covered through reduction in pay band (or comparable reduction). The term ''comparable reduction'' is taken directly from the enabling legislation. These labor organizations also recommended that a definition be added for ''band.'' Commenters, and labor organizations during the meet-and-confer process, recommended that a definition be added for ''day.'' We agree and have added definitions for those terms. A definition of ''reduction in pay'' has also been added to clarify that nonreceipt of a pay increase (such as a rate range adjustment, supplemental adjustment, or a performance pay increase) does not constitute a reduction in pay and therefore is not an adverse action.

During the meet-and-confer process, labor organizations also suggested that the definitions of ''indefinite suspension,'' ''pay,'' and ''suspension'' be modified. Since the definitions for these terms are essentially identical to current statutory and regulatory definitions, we see no basis for making the suggested modifications. Finally, labor organizations, as well as commenters, recommended the deletion of ''mandatory removal offenses'' (MROs). We disagree because of that term's relevance to this section and the fact that the concept of MROs is retained.

Section 9901.704—Coverage

Section 9901.704 describes the types of actions and employees covered by and excluded from coverage under the subpart. Commenters, as well as labor organizations participating in the meet-and-confer process, recommended that employees who are serving in-service probationary periods be given appeal rights. We have clarified that employees who are serving an in-service probationary period will have appeal rights if they are not returned to a grade or band and pay rate no lower than that held before the in-service probationary period. The labor organizations, during the meet-and-confer process, also recommended that we add a provision stating that employees who are excluded from the enabling legislation are not covered by this provision. Such a provision is unnecessary because employees excluded from coverage under the enabling legislation are not covered by any provision of the NSPS regulations.

We received many comments suggesting we add reduction in force (RIF) actions to coverage. We believe the NSPS appeal system should be limited to removals, suspensions for more than 14 days, furlough for 30 days or less, and reduction in pay or pay band (or comparable reduction) as set forth in 5 U.S.C. 9902(h)(4)(A). Employees subject to RIF actions will continue to have the same appeal rights as they do today and that is made clear in subpart F of the regulations. Commenters recommended clarification as to whether adverse actions resulting from agency suitability determinations are excluded. We believe such clarification is unnecessary since agency suitability actions, including removals, are taken under 5 U.S.C. chapter 73. Suitability actions under chapter 73 are by definition not adverse actions. Moreover, the enabling legislation expressly excludes from its coverage suitability actions taken under 5 U.S.C. chapter 73. See 5 U.S.C. 9902(d)(2). Other commenters recommended that term employees be excluded from coverage. The Department wishes to maintain the status quo with respect to term employees' appeal rights. One commenter suggested that the movement of an employee to a lower pay band not be considered an adverse action under NSPS when such movement is the result of a less than fully successful performance rating. We disagree. The enabling legislation identified a reduction in pay band as an appealable action.

Section 9901.711—Standard for Action

This provision describes the standard for taking an action against an employee as ''for such cause as will promote the efficiency of the service.'' During the meet-and-confer process, participating labor organizations, as well as most commenters, agreed with this provision. However, some commenters stated that this standard provides management too much discretion. We have retained this long-standing and well established ''efficiency of the service'' standard.

Section 9901.712—Mandatory Removal Offenses

This provision gives the Secretary the authority to identify Mandatory Removal Offenses (MROs), which are offenses that have a direct and substantial impact on the Department's national security mission. An employee who commits such an offense must be removed from Federal service, unless the Secretary determines in his or her sole and exclusive discretion that a lesser penalty is appropriate. Commenters as well as participating labor organizations during the meet-and-confer process stated that this provision should be deleted in its entirety because in their view, the establishment of MROs exceeds DoD's authority under the enabling legislation and is open to abuse. Some commenters stated that MROs should be defined and subject to public comment through the formal rule-making process. Commenters expressed concern that the Secretary can issue and change the list at will. Some commenters stated that the Secretary should not be the only mitigating authority for MROs and that his non-reviewable discretion is inappropriate for a political appointee. In addition, commenters stated MROs do not leave any room for flexibility based on individual circumstances or mitigating factors and takes the flexibility away from DoD supervisors. Other commenters expressed concern that if an MRO offense is not sustained, an employee can still be charged with a non-MRO offense based on the same facts.

We disagree that the establishment of MROs exceeds the Department's authority. The enabling legislation expressly provides authority to waive the current statutory provision governing adverse action in establishing the HR system. Although no MROs have been established, the provision that allows for the establishment of MROs must be retained to support the vital mission of the Department. We have revised the proposed regulations to provide, at a minimum, that MROs will be (1) identified in advance as part of the Department's implementing issuances, (2) publicized upon establishment via notice in the **Federal Register**, and (3) made known to all employees on a periodic basis, as appropriate, through means determined by the Department. Examples of potential MROs are provided under Major Issues: Adverse Actions and Appeals. The offenses that may be identified as MROs will be so egregious as to have a direct and substantial adverse impact on the Department's national security mission, and therefore would not properly be subject to mitigation except in unusual circumstances as determined by the Secretary. Employees who commit such offenses must be removed from the Department and the Federal service. The support of the national security mission outweighs any loss of flexibility in the system. We disagree that it is inappropriate for the Department to have the ability to take a subsequent action if the offense is found to not be an MRO. We believe that if an employee's misconduct is found to qualify as an MRO, it does not mean that the misconduct should not be addressed. For misconduct amounting to an MRO, mitigation of penalties, review of notice letters, and designation of offenses must be at the highest levels of the Department to prevent abuse, ensure judicious use of the authority, and provide maximum transparency for employees. In light of the above, we believe that MROs need not be subject to public comment through the formal rule-making process. They will, however, be subject to continuing collaboration with employee representatives. This ensures transparency in the process of establishing MROs.

Section 9901.714—Proposal Notice

This provision outlines procedures for issuing proposal notices, including a shorter advance notice period of at least 15 days. Commenters and labor organizations participating in the meet-and-confer process recommended retaining the current 30-day written notice of a proposed adverse action. Other commenters argued that due process is denied because of the potential inability to gather and review evidence within the proposed time frame. We disagree that the advance written notice period should be 30 days. The shortened notice supports the NSPS goal of streamlining the adverse action process and provides adequate time for consideration of evidence. We have clarified in the regulations that the 15-day notice period represents the minimum period of time for advance notice to the employee. We have further modified this section to clarify that notice of proposed adverse action or opportunity to reply are not required in the event of a furlough of 30 days or less without pay due to unforeseeable circumstances.

This provision also shortens the minimum notice period from 7 to 5 days in situations where there is reasonable cause to believe a crime has been committed. Commenters and labor organizations participating in the meet-and-confer process recommended retaining the current crime provision notice period of 7 days. We believe that 5 days is the appropriate amount of time to allow for notice and reply in such situations given the need to take action in these situations. Commenters expressed concern over the lack of an explicit requirement that the Department have actual knowledge of a criminal investigation or criminal charges being filed against an employee before imposing the 5-day notice period. Commenters also recommended that ''reasonable cause'' be defined. The criteria under which the crime provision may be invoked is well established in current statute, regulation, and case law and was not changed in the proposed regulations. We do not believe it necessary to define reasonable cause in these regulations. Each case is unique and considerable guidance is provided in existing case law.

Labor organizations during the meet-and-confer process recommended including a requirement for DoD to provide employees copies of all evidence including exculpatory evidence during the notice period. While the regulations do not require that copies of evidence be delivered to the employee, the Department will ensure that the employee is informed of his or her right to review the Department's evidence supporting the proposed action. There is no need to specifically require DoD to make exculpatory evidence available to the employee during the notice period since all evidence relied upon by the decision-maker must be made available to the employee.

Labor organizations during the meet-and-confer process also recommended modifying the proposed regulations with regard to the status of an employee during the notice period. Under current law and regulation, an employee is normally entitled to be in a pay status during the notice period. A Component may place an employee in a different position or even in a non-duty status, but the employee must continue to be

paid. The labor organizations recommended that the Department's authority to assign an employee to other duties or to place the employee in a non-duty pay status should be substantially limited, even if the Department determines that the employee's continued presence would have an adverse impact on the Department's mission. The labor organizations recommended deleting ''the Department's mission'' as a possible justification for assigning an employee to a different status or position. We do not believe such modification is appropriate. Deleting ''the Department's mission'' as a reason for reassigning an employee to other duties or placing him or her in a non-duty pay status would adversely impact the Department's flexibility in accomplishing the mission.

Commenters stated the Department should not be allowed to require an employee to use personal leave during the notice period. We disagree with the labor organizations' recommended deletion of language in this area. We do not envision requiring an employee to use personal leave during a notice period; however, an employee may voluntarily elect to request leave. If, in the exceptional case, the Department places an employee on personal leave involuntarily, such action would constitute an adverse action and be subject to the procedural requirements of subpart G and, depending on the facts of the case, could potentially be appealed under subpart H. This is consistent with current law and the proposed language is not intended to modify the status quo.

Section 9901.715—Opportunity to Reply

This provision outlines procedures related to the opportunity to reply and provides that employees be granted at least 10 days to reply (or 5 days when there is reasonable cause to believe the employee has committed a crime). Commenters and labor organizations participating in the meet-and-confer process recommended employees be provided at least 30 days to reply instead of 10 days, and at least 7 days when there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. They believe the minimum 10-day (or 5-day, under the crime provision) reply period is not sufficient time for the employee to provide a response and that the shortened time period limits managers' ability to fully consider the employee's reply. Other commenters stated the regulations should allow for the extension of time limits. Commenters and labor organizations participating during the meet-and-confer process also recommended deletion of the requirement that a reply period run concurrently with a notice period.

We disagree that the reply period should be increased and believe the proposed minimum 10-day reply period (or 5 days when the ''crime provision'' is invoked) is ample time for an employee to prepare a response. We also believe that such a period provides sufficient time for a manager to consider an employee's reply. Furthermore, both the 15-day notice period and the 10-day reply period represent minimums and may be extended as necessary at the Department's discretion. We believe that the reply period should run concurrently with the notice period. This is consistent with the goal of streamlining the procedure and is unchanged from current law. The reply period does end prior to the end of the notice period; however, this is necessary to allow time for managers to consider the reply and make a timely decision.

Commenters and labor organizations participating in the meet-and-confer process requested clarification of provisions in this section which refer to an employee being represented by an individual ''at the employee's expense.'' The circumstances under which the employee will be responsible for paying for his or her own representation (*e.g.*, non-Federal employee representative) were clarified during the meet-and-confer process and are reflected in the final regulations. They also recommended deletion of the provision that covers disallowing an individual to serve as the employee's representative, stating that the exclusion of representative standard is too broad and should not be within the discretion of the Department. We disagree with this recommendation because such procedures are necessary for the orderly and fair resolution of the action. We disagree that the standard is too broad, as the criteria are specifically related to the Department's mission.

During the meet-and-confer process, the participating labor organizations also recommended extending the reply period when the Department is considering an employee's medical condition in regard to a proposed adverse action. We disagree that extending the reply period in such situations is necessary in regulation. The 10-day reply period set forth in § 9901.714 represents a minimum and may be increased at the Department's discretion.

Commenters stated that regulations do not allow duty time for the employee to prepare a response and one commenter suggested that we clarify what is meant by a ''reasonable amount of official time'' to review the evidence. Commenters stated the regulations do not discuss whether the employee's representative will be allowed official time to assist the employee. We disagree that the regulations do not allow duty time for the employee to prepare a response. The employee may receive official time to review the Department's supporting evidence and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status. With regard to an employee's representative being allowed official time, the proposed regulation is essentially the same as current law.

Section 9901.716—Decision Notice

This provision outlines procedures for issuance of decision notices. During the meet-and-confer process, participating labor organizations gave alternative proposals regarding the delivery of the decision notice to the employee. One proposal recommended providing the decision notice to the employee on or before the effective date and deleting all language providing guidance if unable to deliver the notice in person. The other proposal recommended delivery by electronic mail and certified mail, return receipt requested if unable to deliver the notice in person. During the meet-and-confer process, participating labor organizations also stated that the Department had no legal authority to mail a decision letter to the last known address. We believe that in circumstances when the Department is unable to deliver the decision notice in person, there must be guidelines provided to ensure all parties understand their responsibilities; therefore, we did not delete the guidance contained in the subsection. However, in response to discussions with labor organizations during the meet-and-confer process and public comments received, the language was modified to broaden delivery methods to include mail, overnight or express delivery service or the use of a messenger service. The regulations will retain the language that the Department will deliver the decision letter to the last known address of record, if unable to deliver in person, as the method of last resort.

Section 9901.717—Departmental Record

This provision describes the Departmental Record. During the meet-and-confer process, participating labor organizations recommended that we amend this provision to be consistent

with 5 U.S.C. 7513(e) by deleting the requirement to retain documents pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. Additionally, they recommended that this provision be amended to require the retention of exculpatory evidence and any material relevant to the action. Some commenters stated that the Department should retain any information that the employee requests to be retained as a part of the official record of any adverse action. We did not revise this provision. This provision establishes sound recordkeeping procedures which are substantively the same as those in 5 U.S.C. 7513(e) except that the proposed provision provides more guidance regarding recordkeeping procedures. Any and all directly relevant evidence will be retained regardless of whether the employee requests the Department do so. One commenter suggested that notation be made in an employee's official records in cases where an employee under investigation for misconduct resigns prior to issuance of a proposal notice. The commenter argued that such documentation could prevent the future employment of an employee who might present a security risk. We do not believe such a notation, based on an ongoing investigation, would be appropriate.

Subpart H—Appeals

General Comments

Subpart H modifies current MSPB appellate procedures for certain adverse actions taken under subpart G. Such changes include establishment of streamlined appellate procedures, providing for Department review of initial decisions, limited discovery, summary judgment, and expedited timeframes. Commenters, including labor organizations participating in the meet-and-confer process, objected to the provisions in subpart H, stating that DoD does not have the authority to make changes in MSPB appellate procedures. They argued that there was no evidence that current procedural protections or the decisions of an arbitrator or MSPB jeopardize national security/defense and there is no need to improve efficiency of the MSPB process. They asserted that it is not necessary for MSPB to provide greater deference to DoD than to any other agency. We disagree. Section 9902(h) expressly authorizes the Secretary to establish an appellate process for employees covered by NSPS, including establishing legal standards and procedures, including standards for applicable relief. In addition, section 9902(d) makes waivable the current statutory requirements for the appeals process. Section 9902(b)(5) also states that the system established under section 9902(a) is not to be limited by any law or authority that is waived in the NSPS regulations. The modifications in this subpart were made following consultation with MSPB officials, as called for in the enabling statute.

In addition, some commenters argued that any modification of current rules regarding an employee's ability to make and have an allegation of discrimination reviewed was beyond the authority of NSPS. We believe these regulations do not impermissibly modify existing EEO procedures and fully retain the right of employees to have allegations of discrimination fully and fairly reviewed and adjudicated. Under these regulations, employees can raise allegations of discrimination as part of any appeal or grievance of an adverse action and, if dissatisfied with the final DoD decision, obtain full MSPB and EEOC review of such allegations.

Commenters also stated that the current personnel system already allows separation or removal to be effected rapidly if in the interest of national security under 5 U.S.C. 7532. Section 7532 is limited in its scope regarding the basis for action and employee appeal channels; therefore we don't believe it appropriately addresses the broad range of offenses and penalties that are necessary to ensure the well disciplined workforce needed to carry out the Department's mission.

Finally, many commenters objected to the Department's review of AJ decisions, questioning the neutrality and impartiality of the review process, as well as its negative impact on due process. While the Department has the authority to review initial AJ decisions, that authority will be limited to those decisions for which either party has timely filed a request for review. The Department may remand, modify or overturn the AJ's decision only based on the criteria in § 9901.807(g)(2)(ii)(B) of these final regulations.

We will continuously monitor and evaluate the appeals process to ensure that these changes are fair.

Other Comments on Specific Sections of Subpart H

Section 9901.802—Applicable Legal Standards and Precedents

These regulations state that in applying existing legal standards and precedents, MSPB and arbitrators are bound by the legal standard set forth in § 9901.107(a)(2). Section 9901.107(a)(2) provides that these regulations must be interpreted in a way that recognizes the critical national security mission of the Department. Each provision must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission as defined by the Secretary; DoD's and OPM's interpretation of NSPS regulations must be accorded great deference. During the meet-and-confer process, the participating labor organizations recommended that we delete the requirement that the MSPB consider DoD's mission when applying legal standards not inconsistent with this subpart. Some commenters also recommended DoD and OPM not be given deference in their interpretations of NSPS regulations.

The authority to require MSPB to give deference to DoD's and OPM's interpretation of NSPS regulations derives from 5 U.S.C. 9902, including section 9902(h)(3), which authorizes establishment of legal standards. It is also based on longstanding standards of legal interpretation, which provides that considerable weight be given to an agency's interpretation of its own regulations. Accordingly, we have not modified this section. We believe that the Department's and OPM's interpretation of the regulations in part 9901 must be given great deference to ensure that appropriate recognition is given to accomplishment of the Department's national security mission when appeals decisions are made. Also during the meet-and-confer process, the participating labor organizations recommended that we modify the language of this section to include references to 5 U.S.C. 2301 and 9902(h)(2) and (3). The suggested additional citations are not necessary as the law and citations noted in this subpart adequately provide for all requirements.

Section 9901.803—Waivers

This section specifies the provisions of title 5, U.S. Code, that are waived for employees covered by the NSPS appeals process established under subpart H. This section also specifies that the appellate procedures in subpart H replace those of the Merit Systems Protection Board (MSPB) to the extent MSPB's procedures are inconsistent with these regulations, and that MSPB must follow these regulations until it issues conforming regulations. Some commenters recommended we delete the reference to modification of 5 U.S.C. 7702 stating this was beyond the authority of NSPS. During the meet-and-confer process, the participating labor organizations also voiced concern that NSPS does not give DoD the authority

to waive or modify discrimination complaint procedures.

The Department's authority to modify 5 U.S.C. 7702 is found in 5 U.S.C. 9902(h), which authorizes the establishment of a new appeals process. Consistent with section 9902(h)(7), we may modify or adapt the mixed case process in these regulations, provided employee rights and remedies are preserved. The final regulations modify some of the procedures for processing mixed cases, while preserving the rights and remedies as required by § 9902(h)(7). These rights include the right to seek EEOC review of an MSPB decision in a mixed case pursuant to 5 U.S.C. 7702(b), which has not been modified. They also preserve judicial review in such cases. Consistent with the enabling legislation, these regulations assure due process and appropriately streamline the procedures of the appeals process dealing with mixed cases.

Section 9901.804—Definitions

During the meet-and-confer process, the participating labor organizations recommended that we amend or delete a number of definitions, such as ''request for review'' and ''mandatory removal offense.'' We did not accept these recommendations because the proposed changes would alter the essence of underlying procedural concepts that are critical to the successful implementation of NSPS.

Section 9901.805—Coverage

This section of the proposed regulation provided that the appeals process covers employee appeals of certain adverse actions taken under subpart G. Commenters and labor organizations participating in the meet-and-confer process suggested we add reduction in force (RIF) and demotions as covered actions. Commenters also recommended that suspensions of 14 days or less be a covered action. Commenters, as well as labor organizations participating in the meet-and-confer process, stated that exclusion of RIF actions from NSPS coverage under the NSPS appeals process contradicts § 9901.611 which states that RIF actions are appealable to the MSPB under 5 CFR 351.901. We disagree that these are contradictory. The provisions indicate that RIF actions are not included as appealable actions under NSPS but are independently appealable to the MSPB. We believe the NSPS appeal system should be limited to those actions set forth in the enabling legislation. Inclusion of additional actions (such as suspensions of 14 days or less) goes beyond the intent of the enabling legislation. ''Demotions'' in NSPS are covered by the concept of reduction in pay band (or comparable reduction), which is covered under § 9901.805(a).

One commenter recommended that we specify when appeal rights are granted or denied based on failure to maintain a condition of employment and explain why appeal rights vary depending on whether the condition of employment was specified at the time of appointment or subsequent to appointment. The applicability of appeal rights when an adverse action is based on failure to maintain a condition of employment requires an individualized assessment of an employee's status and the specific facts of the case. It is not possible to specify a broad rule that would cover all such actions.

Section 9901.806—Alternative Dispute Resolution

This section of the proposed regulations encouraged the use of alternative dispute resolution (ADR) methods to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. The proposed regulations also recognize that these methods may be subject to collective bargaining to the extent permitted by subpart I of part 9901. During the meet-and-confer process, participating labor organizations endorsed the concept. Commenters endorsed the concept of ADR and urged a stronger statement on the use of ADR. Commenters suggested that we establish ombudsman offices at each component in order to follow the ''best practices'' noted elsewhere by the Government Accountability Office, and to facilitate resolution of disputes at the lowest possible level. We believe that the proposed regulations adequately stress the importance of ADR and have made no changes to this section.

Section 9901.807—Appellate Procedures

This section established streamlined appellate procedures and provided for such things as Department review of initial decisions, limited discovery, summary judgment, and expedited timeframes. Commenters and labor organizations participating in the meet-and-confer process stated that this section of the proposed regulations was not organized well and was difficult to follow. We agree and have reorganized the material as indicated below with the previous section designation in brackets. For example, ''9901.807(a)(1) [9901.807(a)]'' indicates that ''9901.807(a)(1)'' is the new designation in the final rules and ''[9901.807(a)]'' is the old designation in the proposed rules. Some commenters recommended that the entire section be deleted, stating DoD does not have the authority to make the changes set forth in this section. We disagree. Section 9902(h) expressly authorizes the Secretary to establish an appeals process. In addition, § 9902(d) expressly authorizes the waiver of the current statutory appeals process. Commenters noted that § 9901.807 does not include a provision for MSPB to re-open a decision of its AJs. This is consistent with the enabling legislation which limits MSPB review to the Department's final decisions which have been appealed to the Board and thus does not authorize Board reopening of initial AJ decisions. Adequate and appropriate review of AJ decisions will result from the Request for Review (RFR) and Petition for Review (PFR) processes.

Section 9901.807(a)(1) [9901.807(a)]

There was no change in this provision. It was merely redesignated.

Section 9901.807(a)(2)(i) [9901.807(b)(1)]

There was no change in this provision. It was merely redesignated. This provision of the proposed regulations is introductory in nature. The actual changes are set forth in later provisions. While there was discussion during the meet-and-confer process and comments on the system elements, we will discuss those comments in the applicable sections.

Section 9901.807(a)(2)(ii) [9901.807(b)(2)]

This provision provides that the AJ will adjudicate appeals and deliver his or her decision to each party and to OPM. During the meet-and-confer process, participating labor organizations recommended that NSPS processing rules be deleted and that the full MSPB have overall and exclusive authority in adjudicating appeals. We disagree. As written, the regulations meet the goals of ensuring appropriate deference to DoD's decisions and penalty determination in adverse actions and streamlining the way such cases are handled while continuing to preserve and safeguard employee due process protections.

Section 9901.807(a)(3) [9901.807(e)]

This provision allows OPM to participate or intervene in the appeal at any time it believes that an erroneous decision may result which will have a substantial impact on civil service law, rule, regulation or policy directive.

During the meet-and-confer process, participating labor organizations stated that this provision should be deleted. We do not agree with the recommendation, as we believe this provision is consistent with current law and is necessary for OPM to carry out its mission.

Section 9901.807(a)(4)(i) and (ii) [9901.807(g)(1) and (2)]

There were no changes in these provisions. They were merely redesignated.

Section 9901.807(a)(5) [9901.807(j)]

There was no change in this provision. It was merely redesignated.

Section 9901.807(a)(6) [9901.807(k)(1)]

This provision sets the time limit for an employee to file an initial appeal through the NSPS appeal system at 20 days. Commenters noted that EEOC regulations provide complainants 30 days to file an appeal with the MSPB after agency decision in mixed cases. Other commenters and labor organizations during the meet-and-confer process expressed concern because the employees were given less time in the appeal process. In regard to the comments on EEOC regulations, we note that the 30-day period provided in EEOC regulations simply reflects the Commission's adoption of the time limit provided in the Board's current regulations.

Section 9901.807(a)(7) [9901.807(k)(2)]

This provision covers disqualification of a party's representative at any time during the appeal process. During the meet-and-confer process, participating labor organizations stated that this provision should be deleted. Commenters stated it was not necessary to provide for procedures to disqualify a party's representative. Some commenters expressed concern that there are no listed criteria for disqualification. We believe this provision is necessary in order to ensure an orderly and fair adjudication. Decisions regarding disqualification will be at the discretion of the AJ and should be consistent (to the degree not inconsistent with these regulations) with current Board rules at 5 CFR 1201.31(b) which provide criteria under which a representative may be disqualified. One commenter requested that we clarify that Department representatives will avoid the appearance of conflict of interest, but may not be disqualified solely on the basis of having advised management on the processing of underlying matters where such advice was within the scope of their responsibilities. For purposes of these regulations, we believe the proposed language adequately covers the disqualification issue.

Section 9901.807(b) [9901.807(k)(4)]

This provision allows the AJ to suspend processing a case only if jointly requested by the parties. During the meet-and-confer process, participating labor organizations recommended that a joint case suspension request requirement be deleted. Commenters recommended allowing the AJ to suspend the case if a single party shows good cause since appellants might need extra time to hire an attorney or locate witnesses. We believe the proposed regulations provide sufficient time to prepare a case, provide an appropriate means to suspend a case, and comport with the goals of NSPS. No changes have been made to this section.

Section 9901.807(c)(1) and (2) [9901.807(i)(1) and (2)]

These provisions discuss settlements. They prohibit the presiding MSPB AJ from requiring settlement discussions. Where the parties agree to participate in formal settlement discussions, these discussions will be conducted by an official other than the presiding AJ. During the meet-and-confer process, participating labor organizations recommended deletion of § 9901.807(i)(1). Commenters were in favor of settlement discussions; however, some believe that the proposed regulations do not encourage such discussions. Some commenters stated that settlement discussions being conducted by the presiding AJ allows the AJ latitude in this area to facilitate settlement and eliminate additional formal settlement procedures. The regulations do encourage settlement; however, we believe strongly that settlement should be completely voluntary and based on the parties' individual interests. Also, we believe that settlement proceedings should be conducted by an official who is not adjudicating the case to avoid actual or perceived conflicts of interest on the part of MSPB adjudicating officials. We have made no change in this section.

Section 9901.807(d)(1), (2), and (3) [9901.807(k)(3), (i), (ii), and (iii)]

These sections modify discovery procedures by placing limits on the extent of discovery. During the meet-and-confer process, participating labor organizations stated that the limits are too restrictive and may be easily abused. Commenters stated the limits would prevent adequate methods to gather evidence necessary for the case and that the limits are arbitrary, placing the employee at a disadvantage. Commenters stated the regulations are unfair, hamper due process, and limit employee defense. We believe these limits will usually allow adequate methods for discovery of evidence, are fair, and do not violate due process. Additionally, we have clarified in these regulations that the AJ may grant additional discovery for necessity and good cause. One commenter requested that we clarify whether the new limitations on discovery replace or augment the existing motion to compel process. To the extent existing rules on discovery, including provisions regarding motions to compel process, are inconsistent with these new limitations on discovery, the existing provisions are modified. Another commenter requested that we limit the number of all requests for production to a total of 50 per case. The regulations already limit the number of requests for production to 25 per pleading. However, the AJ may grant a party's motion for additional discovery upon a showing of necessity and good cause. We believe that this provides appropriate limits on requests for production while providing an avenue for additional discovery if appropriate. Therefore, we choose not to adopt the suggestion.

Section 9901.807(e)(1), (i), (ii), and (iii) [9901.807(d)(1), (i), (ii), and (iii)]

These provisions describe the standard of proof, which must be met by the Department for a decision to be sustained. Preponderance of the evidence is the single standard of proof under NSPS. Commenters have stated the burden of proof for employees has been increased; however, this is inaccurate. The only change in the level of proof is that the regulations adopt a single burden of proof—preponderance of the evidence—for cases based on performance and/or misconduct. (Under current law, agencies must only meet a substantial evidence burden of proof in performance cases taken under chapter 43 of title 5. This is a lower burden than preponderance of the evidence.) The burden remains the same for an appellant. Other commenters stated that the differences between conduct and performance should be acknowledged by maintaining the previous standard (''substantial evidence'') for performance cases. We do not believe the differences warrant different standards and note that under current title 5 provisions, actions taken under chapter 75 based on unacceptable performance are subject to the higher standard of proof. The single (''preponderance'') standard for all

cases, whether taken for reasons of performance, or conduct, or a combination of both, simplifies the appeals process and assures consistency without compromising fairness or burdening the employee. No changes have been made to these provisions.

Section 9901.807(e)(2) [9901.807(k)(5)]

This provision covers the AJ's ability, when some or all materials facts are not in dispute, to issue an order to limit the scope of the hearing or issue a decision without holding a hearing. During the meet-and-confer process, participating labor organizations stated that they accepted the use of summary judgment where the facts of the case are not in dispute; however, they recommended the AJ not be able to render such a decision on his or her own initiative. They also recommended that credibility determinations should not be made absent a hearing. Commenters stated that the burden of proof for the employee has been increased before the employee is allowed a hearing. Other commenters stated a hearing should be held if a material fact is in dispute and there is a credibility question. Some commenters also stated summary judgments have not worked in other forums. Additionally, there were concerns that the employee entitlement to a hearing has been diminished. We did not revise this provision. We believe that the AJ should have the authority to rule in this area on his or her own initiative when some or all material facts are not in dispute. Allowing summary judgment when no material facts are in dispute eliminates the requirement for unnecessary and time-consuming hearings, expediting the process for both parties. Similarly, when a hearing is appropriate, limiting the scope of such hearing to matters in dispute serves the interests of all parties. Both of these measures will streamline the appeals process without compromising due process. Summary judgments are a well-established and effective way of fairly handling cases where material facts are not in dispute. When material facts *are* in dispute, the normal hearing process will be followed.

Section 9901.807(f)(1) [9901.807(k)(7)]

This provision covers the 90-day time limit in which an AJ must make an initial decision. During the meet-and-confer process, participating labor organizations stated that they accepted expediting the process to require that decisions be issued within 90 days by the MSPB AJ. Commenters expressed concern these time limits, with no provisions for extension, will result in inadequate time for case preparation, settlement discussions, and discovery, and fail to take into account unavoidable witness unavailability. Other commenters suggested that this section be modified to require AJs to issue decisions within 30 or 45 days of the last day of a hearing, or the last written response to a summary judgment motion. We did not revise this provision as we believe the 90-day time frame provides ample time for the AJ to make a fair decision and for appropriate pre-hearing and witness arrangements. The new time frame also facilitates the efficient and expeditious resolution of an appeal without impairing due process protections.

Section 9901.807(f)(2)(i)–(v) [9901.807(k)(6)]

These provisions cover mitigation of a penalty and require great deference to the Department's penalty determination. While mitigation is allowed, it is allowed under a limited standard. The labor organizations participating in the meet-and-confer process objected to the deference being shown to the Department in penalty determination and the wholly without justification mitigation standard. They further stated that the proposed language placing a standard for review on the full MSPB is not permissible and stated that the fact finder or reviewing entity should consider the factors as set forth in *Douglas* v. *VA,* 5 MSPR 280, 305–06 (1981), in determining whether the proposed penalty is appropriate. We also received numerous comments expressing concern regarding the mitigation standard of wholly without justification and the appearance that the Department will have to meet a lower threshold to sustain the penalty. Commenters expressed concern that MSPB has less latitude to modify decisions and protect employee rights. Commenters objected to the fact that adjudicators would be required to give deference to the Department's penalty determination. Based on these comments and concerns we have reconsidered this provision and have removed the full MSPB from coverage by this standard. The standards for review for the full MSPB are provided in 5 U.S.C. 9902(h)(5). We will also consider placing pertinent circumstances in an implementing issuance to be used for consideration in penalty determination. Furthermore, we agree to revise the ''wholly without justification'' standard for MSPB AJs that are used as part of the Department's appeals process, as well as arbitrators. Since § 9901.922(f)(2) broadly provides that arbitrators hearing a matter appealable under 5 U.S.C. 7701 or subpart H are bound by the rules in part 9901 (which include the standard for mitigation), we have deleted the references to arbitrators in § 9901.807(f)(2) as superfluous. The standard has been revised to preclude mitigation except when the action is ''totally unwarranted in light of all pertinent circumstances.'' This standard is similar to that recognized by the Federal courts and is intended to limit mitigation of penalties by providing deference to an agency's penalty determination. The Department has statutory authority to establish new legal standards. (See 5 U.S.C. 9902(h)(2).) In this case, the Department is electing to adopt a legal standard that meets the need of the Department by ensuring deference is provided to the Department's penalty determinations along with the requirement that AJs give consideration to the Department's national security mission. The Department bears full accountability for national security; therefore, it is in the best position to determine the most appropriate penalty for misconduct or unacceptable performance. In the past, MSPB has exercised considerable latitude in modifying agency penalties, sometimes to the detriment of DoD's mission. The MSPB AJ and arbitrator may still mitigate penalties for all types of offenses, except mandatory removal offenses. The intent is to restrict the breadth of their discretion to mitigate penalties to only those situations where the penalty is totally unwarranted in light of all pertinent circumstances. When mitigating a penalty, MSPB AJs and arbitrators must apply the maximum justifiable penalty, using the applicable agency table of penalties or other internal guidance.

Section 9901.807(f)(3) and (4) [9901.807(d)(2) and (3)]

These provisions cover the review of charges and performance expectations. They provide that neither the MSPB AJ nor the full MSPB may reverse the Department's action based on the way in which the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge. Similarly, an MSPB AJ or full MSPB may not reverse the Department's action based on the way a performance expectation is expressed, provided the performance expectation would be clear to a reasonable person. The labor organizations participating in the meet-and-confer process stated that the AJ or the full Board should have the authority to consider the way in which the charge

is labeled, the conduct is characterized, or the way the performance expectation is expressed in determining whether the agency's penalty is appropriate. We received many comments stating that the elimination of the requirement to clearly articulate the charge is unfair, does not provide the employee sufficient information to prepare a defense, and should not be permitted. Other commenters expressed concern over whether the AJ would be allowed to mitigate the penalty if the AJ found that the stated charge was mischaracterized or mislabeled. These commenters also questioned whether ''factual allegations'' meant the same as ''basis for the action.'' We did not revise this provision, as we believe that as long as the employee has sufficient notice to respond to the allegations of a charge, the Department will have complied with the notice and due process requirements of these regulations. The Department must prove by preponderance of the evidence that an action taken against an employee promotes the efficiency of the service. Mitigation may also be appropriate in such cases provided it meets the standards established in these regulations. Additionally, this section requires that performance expectations be clearly conveyed in a manner understandable to a ''reasonable person.'' MSPB AJs and the full MSPB will judge the Department's expression of performance expectations by a ''reasonable person'' standard. These provisions are written to eliminate overly technical and legalistic aspects of the current appeals process, while preserving employees' due process rights.

Section 9901.807(f)(5), (i) and (ii) [9901.807(c), (1) and (2)]

These provisions covered the granting of interim relief. They stated the full MSPB may not grant interim relief until after the Department's final decision. During the meet-and-confer process, participating labor organizations recommended that interim relief be granted by the full MSPB as a matter of course if the AJ finds in favor of the appellant. We received comments stating that the enabling legislation does not specifically allow DoD to limit the full MSPB's authority to grant interim relief in this way. Commenters also stated this limitation might impermissibly alter EEO procedures. Commenters, including labor organizations during the meet-and-confer process, stated DoD should not have discretion to temporarily place an employee in a different position when interim relief is ordered by the full MSPB. Commenters also questioned what the employee's pay status would be while on excused absence. Other commenters recommended we allow the AJ to grant interim relief or, in the alternative, establish a procedure for interlocutory appeal to allow a stay until the Board hears the full case. Commenters objected to attorney fees not being paid until a final MSPB decision. We believe the limitation on the AJs' authority to grant interim relief is necessary. In addition, it is consistent with the enabling legislation, which prohibits granting interim relief unless it is specifically ordered by the full Board (5 U.S.C. 9902(h)(4)). It is premature for the AJ to grant interim relief when DoD has filed a request for review. To provide for the efficient accomplishment of the mission and to avoid disruption in the workplace, DoD should have discretion in determining the placement of an employee during the period of interim relief. Explanation of the pay status of employees in a period of excused absence is not required because, by definition, excused absence is an absence from duty without loss of pay and without charge to leave. Finally, the provision relating to attorney fees represents no change from current law.

Section 9901.807(f)(6)(i) and (ii) [9901.807(h)(1) and (h)(2)]

These provisions of the proposed regulations established a new standard for recovering attorney fees, which was intended to simplify the process. Comments received on the proposed regulations and labor organizations, during the meet-and-confer process, argued that the new standard was unreasonable, unfair, would discourage employees from challenging wrongful terminations, violated the Back Pay Act, and would result in uneconomical, piecemeal litigation. After consideration of these comments, we have revised the NSPS regulations to retain the pre-NSPS statutory standard under which such fees may be awarded; therefore, all objections to proposed changes have been addressed.

Section 9901.807(g) [9901.807(k)(8)]

This provision covers the procedures utilized to arrive at the Department's final decision in appeals of adverse actions. Commenters, and participating labor organizations during the meet-and-confer process, stated that the provisions for the RFR process and the Department's review of AJ decisions should be deleted from the regulations. Commenters also recommended simplifying the process and placing deadlines in the Department's review of AJ decisions. Further, commenters stated that the RFR process is unwarranted, fails to preserve due process protections, and detracts from the goals of streamlining the appeals process. These provisions will not be deleted from the regulations. Though somewhat detailed, the Secretary is expressly authorized by 5 U.S.C. 9902(h) to establish an appeals process. The process contained in this regulation is necessary to assure that the Department's national security mission is appropriately considered in adverse action appeals decisions. The Department will be constrained in the exercise of this authority by the provisions of § 9901.807(g)(2)(ii). We anticipate that relatively few cases will be reviewed by the Department under this authority.

Section 9901.807(g)(1) [9901.807(k)(8)(i)]

This provision covers who will receive and act on an RFR. During the meet-and-confer process, participating labor organizations stated that the proposed regulations did not specify the official who would remand, modify, or reverse the MSPB AJ's initial decision. We also received comments regarding the extension of the strict time frames within the NSPS appeals process. DoD will establish the process for receiving and acting on an RFR, including time limits for the Department to take action on an RFR, in implementing issuances. We have clarified that in light of the expedited time frames in the appellate process, an extension for the request for review will be granted if a good reason for the delay is shown.

Section 9901.807(g)(2)(i), (ii), (A), (B) and (C) [9901.807(k)(8)(ii), (iii), (A), (B), and (C)]

These provisions cover the RFR process where, under limited circumstances, the Department may affirm, remand, modify, or reverse an AJ's initial decision for which an RFR has been filed. Commenters and labor organizations during the meet-and-confer process stated that this review authority is arbitrary, capricious and a violation of due process. Comments were received regarding additional complexity, expense, and length added to the appeal process by the internal DoD review. We agree that the internal appellate process must be credible and preserve due process. It preserves due process for reasons stated in the general comments on adverse actions and appeals. To that end, the Department is committed to establishing an internal entity that adheres to merit system principles. This process provides the Department the necessary authority to

review initial AJ decisions to ensure that such decisions interpret NSPS and these regulations in a way that recognizes the critical mission of the Department and to determine which of those cases are of a precedent-setting nature. Although the process may be lengthened in some aspects, we have gained efficiencies and mission-related benefits in other areas that more than offset any potential increases in time or costs at any step of the process. Moreover, we anticipate relatively few cases will be reviewed by DoD, since DoD may reverse or modify initial AJ decisions only under the limited criteria specified in § 9901.807(g), thus minimizing any increase in processing time.

Some commenters questioned two of the bases for modifying or reversing an AJ decision: The Department's national security mission and conflict with Governmentwide rules. These commenters stated that impact on national security mission alone, regardless of the appellant's guilt or innocence, would not be grounds to modify or reverse an AJ decision. The second point the commenters made was that the Department lacked expertise to interpret Governmentwide regulations. We recognize that the wording of the regulation regarding the Department's modification or reversal of an AJ's decision based on national security fails to specifically reference the employee's guilt or innocence. However, an employee's culpability is a prerequisite to sustaining an action. Additionally, the requirement for all actions to promote the efficiency of the service and further review by the full MSPB provide additional safeguards for employees. We believe the Department has sufficient expertise to determine compliance with Governmentwide regulations.

Lastly, we received comments regarding vague remand provisions and lack of time for the AJ to make a decision if a summary judgment was remanded with a direction to hold a hearing. We will establish timelines and remand provisions for the Department's review of the AJ's decision in an implementing issuance. Further, we have revised the regulation to allow the AJ more time, 45 days versus 30 days, to make a decision in those instances where they are directed to hold a hearing in a case involving summary judgment.

Section 9901.807(g)(3)(A) and (B) [9901.807(k)(8)(ii), (A) and (B)]

This provision covers the precedential effect of a Department decision. Commenters and labor organizations participating in the meet-and-confer process stated that the Department should not be allowed to determine which cases would set precedent, and they recommended revising the regulation to state that any AJ decision is precedential unless it is reversed or modified by the full MSPB. Commenters stated that Departmental decisions should be considered precedential even if subsequently overturned by the full MSPB. We believe the Department should be able to determine that some Department decisions are important enough to serve as precedent even though not acted upon by the full MSPB. Further, we believe that the Department must be governed by the rulings of the full MSPB, if the Department's decision is reversed or modified by the full MSPB, unless overturned by a court.

Section 9901.807(g)(4) [9901.807(k)(8)(ii)]

This provision covers the publication of precedential decisions. During the meet-and-confer process, participating labor organizations stated that there were not any details regarding the publication of decisions. Commenters echoed this concern. We agree with the labor organizations and have added clarifying language regarding publication of DoD precedential decisions, the details of which will be provided in implementing issuances.

Section 9901.807(h)(1) [9901.807(f)]

This provision provides for filing for a Petition for Review by a party or the Director of OPM. During the meet-and-confer process, participating labor organizations stated that the Department should delete the provision which allows OPM to petition MSPB for review. We disagree. While OPM is responsible for providing guidance and assistance to DoD in developing a new human resources management system, it also has responsibility for protecting Governmentwide institutional interests regarding the civil service system. Therefore, we believe that OPM must have the authority to act if it believes a decision will have substantial impact on civil service law, rule, regulation, or policy directive. One commenter requested that we clarify whether this provision eliminates MSPB's right to reopen an appeal on its own motion. In accordance with § 9901.807, MSPB may only review those decisions for which a petition for review has been filed by the Department, OPM, or an employee.

Section 9901.807(h)(2)(i), (ii), and (iii)(A)(B)(C) and (iv) [9901.807(k)(9) and (10)]

These provisions cover the petition for review process to the full MSPB. Further, these provisions cover the standards for the full MSPB review as stated in 5 U.S.C. 9901(h). During the meet-and-confer process, participating labor organizations accepted expediting the process to require decisions be issued within 90 days by the full MSPB. However, these provisions have been clarified by including the review standards as stated in 5 U.S.C. 9901(h).

Section 9901.807(h)(3) [9901.807(k)(11)]

This provision covers OPM's request for reconsideration of an MSPB decision. During the meet-and-confer process, participating labor organizations recommended that this provision be deleted. We did not accept this recommendation because this provision is consistent with current law. This provision is necessary for OPM to carry out its mission, which includes protecting Governmentwide institutional interests regarding the civil service system.

Section 9901.807(h)(4) [9901.807(l)]

This provision addresses the failure of MSPB to meet established deadlines and the reporting requirements. Commenters recommended that this reporting requirement be deleted while other commenters recommended that MSPB submit quarterly or annual reports. We did not accept the recommendations to change the provisions as we consider the timelines placed on MSPB as being an integral part of streamlining the Department's appellate process. This reporting requirement is only imposed if a deadline is missed. We are confident that MSPB will rarely, if ever, fail to meet the required deadlines. As a result, any report required by this provision will rarely be necessary.

Section 9901.807(i) [9901.807(m)]

This provision covers the Department's authority to seek judicial review of MSPB decisions. We made a technical correction to delete the reference to the Department seeking reconsideration by MSPB of a final MSPB decision because the Department has that ability under current MSPB rules.

Section 9901.808—Appeals of Mandatory Removal Actions

This provision covers appeals of mandatory removal actions (MROs). It states that only the Secretary may mitigate the penalty for a sustained MRO. Additionally, it states that if the

MSPB AJ or the full MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, the Department is not precluded from subsequently proposing an adverse action based in whole or in part of the same or similar evidence. During the meet-and-confer process, participating labor organizations stated that this provision should be deleted in its entirety. Commenters and labor organizations in the meet-and-confer process stated that the Secretary should not be the only authority to mitigate MROs and that limiting the full Board's ability to mitigate MROs is contrary to the enabling legislation. Commenters also stated that the proposed provisions inappropriately give DoD ''two bites at the apple'' when an action is not found to amount to an MRO since the Department may take a subsequent action on the same evidence. Other commenters were concerned that an employee might not be entitled to attorney fees even if the employee prevailed on the MRO issue, but failed in prevailing in a subsequent action based on the same facts. We disagree that this provision should be deleted. The Secretary is expressly authorized under 5 U.S.C. 9902(h) to establish appeals procedures and standards for relief, including standards for mitigation of penalties. This process is necessary to support the national security mission of the Department. We do agree, however, that the enabling legislation allows mitigation of MRO penalties by the full MSPB and have modified the provision accordingly. We disagree that it is inappropriate for the Department to have the ability to take a subsequent action if the offense is found to not be an MRO. Though an employee's misconduct may not be found to qualify as an MRO, it does not mean that the misconduct should not be addressed. Subsequent proposal of an adverse action based in whole or in part on the same or similar evidence is consistent with what can occur today under current law. Finally, we believe attorney fees will be fairly awarded based on the latest change to these regulations.

Section 9901.809—Actions Involving Discrimination

This provision outlines the processes for handling appeals of actions in which discrimination is alleged. During the meet-and-confer process participating labor organizations stated that this provision should be deleted because it inappropriately modifies processes for discrimination claims. We disagree. Section 9902(h) expressly authorizes the Secretary to establish legal standards and procedures for employee appeals. Consistent with section 9902(h)(7), we may modify or adapt the mixed case process in these regulations, provided employee rights and remedies are preserved. The final regulations modify some of the procedures for processing mixed cases, while preserving the rights and remedies as required by section 9902(h)(7).

Some commenters stated this provision is unclear and suggested that we delete the provision or rewrite it. Several commenters stated that the provision should be modified to eliminate potential confusion over language that appears to require the Department to forward to MSPB a non-appealed action. We agree with this comment and have amended the regulations to provide that an appellant may choose to pursue his or her allegation of discrimination even when no PFR is filed with the Board. In such cases, the appellant can request the Department to refer the discrimination issue to the Board, the Board will then issue a final decision on the discrimination allegation which may then be pursued to EEOC or district court. Some commenters recommended we delete the reference to modifying 5 U.S.C. 7702 stating this was beyond the authority of NSPS. We believe the proposed regulations do not impermissibly modify existing EEO rights and remedies. To clarify this section, we have modified some of the proposed language without altering any of the proposed intent.

Subpart I—Labor-Management Relations

General Comments

Commenters, including, labor organizations participating in the meet-and-confer process, objected to subpart I in its entirety arguing that Congress did not authorize the Secretary and Director to modify 5 U.S.C. 71 beyond providing for bargaining above the level of unit recognition and the establishment of a new independent third party to review and resolve labor management disputes. We disagree. In enacting chapter 99, Congress expressly recognized the need for the Department to design a labor relations system that both addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission and allows for a collaborative issued-based approach to labor management relations. The labor relations system established in subpart I does this by creating a new, tailored approach to labor relations. While the scope of bargaining is reduced in some areas, such as management rights, to enable the Department to better utilize its civilian workforce to support rapidly changing national security challenges, such as the Global War on Terrorism and supporting humanitarian assistance missions here and abroad, employee representatives are given opportunities to participate in new areas that have a substantive impact on the daily lives of the workers they represent. However, through continuing collaboration (§ 9901.107), employee representatives will have the opportunity to participate in the planning, development, and implementation of the Department's implementing issuances, which will cover subjects ranging from the pay and performance management systems to staffing and classification.

The labor relations system is consistent with the general parameters Congress provided, including the process for involving employee representatives (see 5 U.S.C. 9902(m)(3) and (4)). It mandated that the new system may not *expand* the scope of collective bargaining beyond the scope of bargaining available today under chapter 71, even where provisions of title 5 are waived or waivable (5 U.S.C. 9902(m)(7)), and required that employees be authorized to organize and bargain collectively within the framework established in chapter 99, that is, within the framework of a system that promotes a collaborative issue-based approach to labor relations and which is developed, established, and implemented to enable the Department's civilian workforce to better support the Department's national security mission (5 U.S.C. 9902(b)(4)).

These commenters also argued that there is no legal authority to invalidate provisions in collective bargaining agreements with implementing issuances or issuances. Again, we disagree. First, Congress authorized the Department to establish and implement the HR system by providing an alternative to collective bargaining for involving employee representatives in the planning, development, and implementation of that system and making this the exclusive process for their involvement (5 U.S.C. 9902(f)). It would be impossible to implement the HR system authorized by Congress without overriding conflicting provisions of existing collective bargaining agreements.

Moreover, in taking the steps necessary to establish and adjust the labor relations system, Congress specifically recognized that the provisions of this system will supersede existing collective bargaining agreements covering Department employees and negotiated pursuant to

the provisions of chapter 71 except as otherwise determined by the Secretary (5 U.S.C. 9902(m)(8)). The proposed regulations stopped well short of this authority by providing for a process that would not supersede collective bargaining agreements in their entirety. Instead, the proposed regulations provided a much more constrained approach, providing only that those specific provisions of collective bargaining agreements conflicting with these NSPS regulations or NSPS implementing issuances would be superseded. This very narrow authority is essential to enable the Department to establish and implement one NSPS across the Department. Absence of this authority would effectively defeat the intent of Congress by denying the Department the ability to have a single HR system to support the Department's national security mission.

During the meet-and-confer process, it became clear that there was confusion over which type of issuance would supersede conflicting provisions of collective bargaining agreements. Some commenters, and labor organizations participating in the meet-and-confer process, recommended that collective bargaining agreements should not be superseded before their expiration. Participating labor organizations effectively argued that the Department did not need the authority to immediately supersede collective bargaining provisions with issuances not implementing NSPS. We agree and have amended the final regulations to provide that conflicting collective bargaining agreement provisions will not immediately be superseded by issuances, although such provisions must be brought into conformance with the issuance upon expiration of the agreement or renegotiation of the provision during the term of the agreement.

However, to ensure consistent implementation of NSPS across organizations with representation by different bargaining units, we continue to believe that implementing issuances must take effect immediately and thus supersede any conflicting provisions of collective bargaining agreements for NSPS-covered employees. While DoD plans to implement the labor relations system DoD-wide immediately, the HR system will be implemented in spirals. The implementing issuances for the HR system will only apply to employees who are covered by the NSPS HR system.

Commenters, including labor organizations during the meet-and-confer process, also recommended that the design and implementation of every aspect of the proposed NSPS, including the pay, performance, and classification system and appeals process, be subject to collective bargaining. Congress expressly prohibited expanding the scope of collective bargaining in 5 U.S.C. 9902(m)(7) which provides that nothing in section 9902 will be construed to expand the scope of bargaining with respect to provisions in title 5 that may be waived, modified, or otherwise affected under section 9902. In lieu of bargaining, Congress charged OPM and DoD to establish the mechanism for continuing involvement of employee representatives in 5 U.S.C. 9902(f)(1)(d) and (m)(2). With this in mind, we provided a number of mechanisms to ensure the substantive involvement of labor organizations in such things as the development of implementing issuances, the administration of the Department's new pay system, and the nomination of members to the National Security Labor Relations Board (NSLRB or Board). Other concerns related to the scope of bargaining are addressed in the discussion of the related sections of subpart I that follow.

We also expressly provided two specific mechanisms to address the mandate that the labor relations system should allow for a collaborative, issue-based approach to labor relations. National level bargaining, as provided for in this regulation, and which is expressly authorized in the enabling legislation (5 U.S.C. 9902(g)), allows for an issue-based approach to addressing matters of significance to the Department as a whole. Multi-unit bargaining, as provided for in these regulations, allows for a collaborative, issue-based approach to addressing matters of interest to specific communities of interest within DoD, such as military installations that house multiple organizations and multiple bargaining units.

Other Comments on Specific Sections of Subpart I

Section 9901.901—Purpose

The proposed regulation restates the enabling legislation's purpose to provide DoD and OPM with a labor-management relations system that addresses the unique role that Department employees have in supporting the Department's national security mission and to promote a collaborative issue-based approach to labor management relations. In their comments and during the meet-and-confer process, participating labor organizations recommended that we include in this section a statement that labor organizations and collective bargaining are in the public interest, consistent with the enabling legislation's preservation of collective bargaining rights.

We have decided to retain the originally proposed language, while adding an express reference to the collaborative issued-based approach authorized by the enabling legislation. This section of the regulations recognizes and stresses the fundamental purpose underlying the enabling legislation and the statutory mandate to build a flexible HR system that supports the unique mission of DoD and the role of DoD civilian employees as a critical part of the Department's Total Force. Consistent with the enabling legislation, the labor relations system specifically recognizes the right of employees to organize and bargain collectively subject to limitations established by law, including these regulations, applicable Executive orders, and any other legal authority.

Section 9901.902—Scope of Authority

A number of commenters, including labor organizations participating in the meet-and-confer process, presented their views that the enabling legislation did not authorize the Department and OPM to modify provisions of 5 U.S.C. chapter 71. We disagree. The enabling legislation authorizes the Secretary, together with the Director, to establish and adjust a labor relations system in support of the overall HR system notwithstanding the provisions of the current system, as set forth in chapter 71 (5 U.S.C. 9902(d)(2) and 5 U.S.C. 9902(m)(1) and (2)). In addition, as discussed in *General Comments,* Congress provided the parameters for that system, including, for example, prohibiting the expansion of the scope of bargaining; requiring that the system address the unique role that the Department's civilian force work plays in supporting the Department's national security mission; authorizing the system to allow for a collaborative issue-based approach to labor management relations; requiring that employees be authorized to bargain collectively, as provided for in chapter 99 (not as provided for in chapter 71); mandating that the system provide for third party review of decisions; and authorizing the system to utilize national level bargaining (an authority separately established in 5 U.S.C. 9902(g)).

Section 9901.903—Definitions

In their comments and during the meet-and-confer process, participating labor organizations recommended that the current definition of ''conditions of

employment'' be expanded to include the classification of any position. A number of commenters, including labor organizations participating in meet-and-confer process, also recommended that we modify the definition of conditions of employment to eliminate the exclusion of pay. As a general matter, the classification or pay of Federal employees is not subject to negotiation today. This restriction is consistent with the prohibition on any expansion of the scope of bargaining in 5 U.S.C. 9902(m)(7). Therefore, we have not adopted this suggestion.

Some commenters, including labor organizations participating in meet-and-confer process, also raised concerns that the revised definition of ''confidential employee'' was overbroad and could be subject to misapplication. They recommended that we retain the definition of ''confidential employee'' contained in 5 U.S.C. 7103. We agree with the recommendation and have modified the regulation accordingly.

During the meet-and-confer process, the impact of issuances on the collective bargaining process and existing collective bargaining agreements was discussed. During these discussions it became apparent that there was confusion surrounding the distinction between ''implementing issuances'' and ''issuances.'' To address these concerns, we have modified the definitions, including the definition of ''implementing issuance'' as it appears in subpart A. In addition, we have cross-referenced the definitions of both ''issuance'' and ''implementing issuance'' that appear in subpart A so that the differences in the two types of issuances will be readily apparent.

The labor organizations participating in the meet-and-confer process expressed concerns that any manager could simply sign an issuance or implementing issuance and thereby invalidate legitimate provisions of a collective bargaining agreement. They recommended that we restrict the authority to sign such issuances to the Secretary or Deputy Secretary alone. We believe that restricting this authority to the Secretary or Deputy Secretary is far too restrictive for such a large and diverse Department. Therefore, we have revised the language to make clear that only the Secretary, Deputy Secretary, Principal Staff Assistants, or Secretaries of the Military Departments may sign an ''implementing issuance.'' In addition, we have revised the language to make clear that only these same officials may sign an ''issuance,'' which may limit the scope of collective bargaining as provided for in this regulation. This is a very high level of approval and requires extensive coordination within the Department. We believe that this change addresses the legitimate concerns of the commenters while providing the Department the necessary flexibility to meet changing national security requirements and to efficiently manage its workforce.

A number of commenters and labor organizations participating in the meet-and-confer process recommended that we not change the definition of ''supervisor'' with regard to nurses and firefighters. We agree, and have revised the definition of ''supervisor'' as it relates to firefighters and nurses to be consistent with what is in chapter 71 today. Commenters also expressed a range of concerns regarding the portion of the definition of ''supervisor'' dealing with supervision of members of the armed forces. A number of commenters questioned if the intent was that military technicians who supervise members of the reserves, such as on drill weekends, would be considered supervisors. While we believe this language is clear, the comments lead us to believe that it has been misunderstood. This provision only affects civilian employees and was intended to apply to those situations where a civilian is exercising supervisory control over military members. With regard to military technicians who are required to hold military reserve positions in addition to their civilian positions, this definition would only be applicable while serving in their civilian capacity. Thus, an individual who is not a supervisor in his or her civilian status, but supervises reservists while in military status, would not meet the definition of ''supervisor'' for purposes of subpart I. If an individual is exercising supervisory duties and authorities over military personnel, as defined in the regulation, we believe that individual is a member of the management team, and his or her inclusion within a bargaining unit would create an inherent conflict of interest. Therefore, we have retained that portion of the definition of ''supervisor'' with respect to the supervision of members of the armed forces.

Section 9901.904—Coverage

During the meet-and-confer process, the participating labor organizations recommended that the labor relations system be phased in spirals like the HR system rather than implemented concurrently Department-wide. In fact, the participating labor organizations asserted that the requirement to phase in the HR system was equally applicable to the labor relations system. We disagree. The provisions authorizing the establishment of a labor relations system (5 U.S.C. 9902(m)) are clearly separate from the authority to establish an HR system (5 U.S.C. 9902(a)) and the requirement for phased implementation in 5 U.S.C. 9902(l) is not applicable to the labor relations system. We have therefore not adopted this recommendation.

We also received comments that certain groups of employees were unique and therefore should not be covered by the labor relations system. Specifically, commenters suggested that teachers should be excluded from coverage as they do not play a combat support role and already sign mobility agreements giving management all the flexibility it needs. We disagree. Their contributions in teaching the children of our service men and women and the civilian employees who support them are absolutely critical to the successful accomplishment of the Department's national security mission. Thus, the final regulations continue to cover teachers in the labor relations system. Another group of employees that commenters recommended for exclusion from the labor relations system based on their unique characteristics are employees covered under the Civilian Mariner or CIVMARS program. While we agree that some of the rules governing these employees are unique within the Department, these employees are presently covered by chapter 71. Given that fact, we find no compelling argument that these employees should not now be covered under the labor relations provisions of these regulations and we have therefore not adopted the recommendation.

Some commenters, including participating labor organizations, stated that there was no indication in the proposed regulations that DoD or OPM responded to the intent of Congress that ''in designing the labor relations system the Secretary should take into consideration the unique requirements and contributions of public safety employees in supporting the national security mission of the Department.'' The commenters are referring to the Conference Report on H.R. 1588, the ''National Defense Authorization Act for Fiscal Year 2004,'' H. Rpt. 108–354, page 760. While the proposed regulations were silent regarding this provision in the conference report, we have taken into consideration the unique requirements and contributions of public safety employees in supporting the national security mission of the Department. The role of public safety employees was considered throughout the design process for the

labor relations system. While we agree that these employees are unique within the Department, they are presently covered by chapter 71 and we found no compelling reason that these employees should not now be covered under the labor relations provisions of these regulations.

Section 9901.905—Impact on Existing Agreements

Commenters, including labor organizations participating in the meet-and-confer process, expressed concern that Congress did not intend the Department to have the authority to supersede valid provisions of collective bargaining agreements through the promulgation of implementing issuances and issuances. These commenters argued that conflicting provisions of collective bargaining agreements should remain intact until renegotiated regardless of the extension of a new Department policy through implementing issuances or issuances. We disagree with respect to ''implementing issuances,'' but agree as to ''issuances,'' for the reasons explained under *General Comments*. We have added a new subparagraph, § 9901.905(c) to make clear that any provision of a collective bargaining agreement that is inconsistent with issuances that do not implement NSPS will remain in effect until the expiration, renewal, or extension of the agreement, whichever occurs first.

Commenters also expressed concern that 60 days is not sufficient time to bring into conformance the remaining negotiable provisions of a collective bargaining agreement, following invalidation as authorized by § 9901.905 of the regulations. We disagree. This bargaining will be limited to only those specific contract provisions that are rendered unenforceable, or require changes to their language to conform to the implementing issuance or these regulations. Therefore, we believe that 60 days is sufficient time for bargaining, given the limited scope. For these reasons, we have not adopted the recommended changes.

We received several comments that this section is confusing. We agree with these comments and have revised the language in § 9901.905(b) to make clear that it is only those collective bargaining agreement provisions that are directly affected by the collective bargaining agreement provisions rendered unenforceable by this regulation or an implementing issuance that must be brought into conformance.

We have also substantively modified the provisions in § 9901.905(b) in response to concerns raised during the meet-and-confer process that the language in the proposed regulations would have the effect of forcing the parties to wait until expiration of the 60-day period to seek assistance with any bargaining impasse. We agree with this concern and have modified the language in the final regulation to permit the parties to utilize § 9901.920 impasse procedures to obtain assistance at any time.

Section 9901.906—Employee Rights

Commenters recommended that we delete this section as it is essentially identical to 5 U.S.C. 7102 and, thus, unnecessary. We disagree. Although this provision is essentially the same as the chapter 71 provision, we believe that it is important to clearly restate these rights in subpart I to provide employees notice of their statutory rights. Therefore, we have not adopted the recommended change.

Section 9901.907—National Security Labor Relations Board

Commenters raised the concern that the NSLRB will not be fully staffed and operational before the onset of bargaining disputes arising from implementation of subpart I. We agree with this concern and have modified the regulation to provide the Secretary with the authority to determine the effective date for the establishment of the NSLRB.

Commenters objected to the creation of the NSLRB, and recommended that the regulations preserve the authority of FLRA, FMCS, and FSIP. They remarked that these agencies, which are independent, impartial, and already funded, currently adjudicate the labor disputes that the proposed regulations authorize the NSLRB to resolve. In this regard, they challenged the independence and impartiality of any NSLRB member appointed by the Secretary. Therefore, they objected to any change to the status quo.

We disagree that the NSLRB will not be an independent and impartial third party. The proposed regulations provide that NSLRB members may only be removed by the Secretary for inefficiency, neglect of duty, or malfeasance in office. This is the same standard that currently applies to members of the FLRA. Since this standard and the establishment of the NSLRB itself are provided for in these enabling regulations, they are beyond the scope of the Secretary's authority to change unilaterally. In addition, these regulations authorize the NSLRB to issue its own rules and operational procedures. The concatenation of these provisions assures the NSLRB's independence. Moreover, while there will be costs associated with the establishment of the NSLRB, we believe these costs will be offset by the increased efficiency in the resolution of labor disputes.

Commenters recommended that the final regulations set strict tenure requirements and limit the tenure for NSLRB board members to one term, with no possibility for renewal or extension. We note that the proposed regulations set the term of NSLRB member appointments at 3 years, but we do not agree that there should be a prohibition on members serving an additional term. These individuals may be viewed as exemplary adjudicators not only to management, but also to the labor organizations. To unilaterally exclude members from serving additional terms would limit the applicant pool and possibly lead to extended vacancies. We therefore have not accepted the recommendation.

However, commenters, including labor organizations participating in the meet-and-confer process, recommended that we provide for more union involvement in the appointment of NSLRB members. We agree with these commenters and, thus, have modified the regulations to provide a process whereby employee representatives may submit a list of nominees for the Secretary's consideration for appointment of non-chair members of the NSLRB. We have also provided that the Secretary may consult with employee organizations to obtain additional information regarding any nominee submitted.

Other commenters approved of the proposal to establish the NSLRB, indicating that the NSLRB would afford the Department greater regularity and consistency in case processing than currently provided by FLRA. Labor organizations participating in the meet-and-confer process noted that the ''one-stop shop'' concept of the NSLRB was preferable to the division of prosecutorial, adjudicatory, and mediation responsibilities provided for in the current system. We agree.

Commenters suggested that we pursue a new statutory authority for direct judicial review of NSLRB decisions. While such a proposal is reasonable, enactment would be time consuming, uncertain, and subject to significant revision during the legislative process. Our proposed process as authorized by section 9902(m)(6) subjects certain final NSLRB decisions to FLRA review, which in turn would be subject to judicial review as it is under chapter 71. We believe this is a more expeditious and appropriate approach. This process affords the parties the opportunity to

obtain review of an NSLRB decision without the need for court proceedings and, in many cases, the FLRA review may be sufficient to resolve the dispute. Therefore, we have not adopted this suggestion.

However, comments related to judicial review revealed confusion regarding the process for judicial review, and we have, therefore, eliminated the reference to judicial review in § 9901.907. We have instead added a new paragraph (c) in § 9901.909 that describes the process for appellate review of NSLRB decisions. To be absolutely clear, § 9901.909 provides the mechanism for obtaining judicial review beginning with the appellate review of the FLRA. We have also modified paragraph (d) (paragraph (c) in the proposed regulation) of § 9901.909 by adding language reflecting our intent that judicial review of FLRA decisions is obtained pursuant to 5 U.S.C. 7123, which is modified only to conform relevant citations in chapter 71 to the corresponding provisions in subpart I.

Although many commenters, including labor organizations participating in the meet-and-confer process, did not support its establishment, we have decided to retain the NSLRB. As we indicated in the Preamble accompanying the proposed regulations, it ensures that those who adjudicate the most critical labor disputes in the Department do so quickly and with an understanding and appreciation of the unique challenges that the Department faces in carrying out its mission.

Section 9901.908—Powers and Duties of the Board and Section 9901.909—Powers and Duties of the Federal Labor Relations Authority

Commenters recommended that FLRA retain greater jurisdiction over the Department's labor disputes. Specifically, they expressed the view that not all labor relations disputes arising under NSPS will significantly impact the DoD's mission enough to warrant their removal from FLRA jurisdiction. We disagree. It is imperative that the NSLRB retain jurisdiction over matters that require efficient review and understanding of the Department's mission. This is consistent with the requirement in 5 U.S.C. 9902(m)(1) that the system OPM and DoD establish address the unique role that the Department's civilian workforce plays in support of the Department's national security mission. As a result, the final regulations give the NSLRB jurisdiction over disputes concerning the duty to bargain, the scope of bargaining, negotiation impasses, and related exceptions to arbitration awards. In addition, the final regulations clarify that the FLRA will review Board decisions on unfair labor practices (except when the Board declines to adjudicate the matter), arbitration awards under § 9901.908, and negotiability disputes.

Commenters further inquired about the NSLRB's authority to investigate unfair labor practices and other labor disputes. We agree that the NSLRB should have the authority to investigate and have modified the regulations to provide the NSLRB with authority to establish procedures for investigations in their regulations. In addition, we have clarified that the Board has the authority, similar to that exercised today by the FLRA General Counsel, to exercise unreviewable discretion to dismiss unfair labor practice allegations.

Commenters expressed concern that the Board would not be fully equipped to handle the extreme workload related to the implementation of the labor relations system at stand up. We agree. We have added a new § 9901.908(a), to reflect the change discussed under § 9901.907, National Security Labor Relations Board, which provides the Secretary with the authority to determine the date of establishment of the NSLRB. Pending establishment of the NSLRB, the regulations also provide the Secretary discretion, in consultation with the Director, to designate another third party to exercise the authority of the Board in the interim.

Commenters questioned why the proposed regulations authorized the NSLRB to issue, at the request of any party, binding opinions on matters within its jurisdiction that would be subject to FLRA and judicial review. They further questioned who would have standing to seek review, other than the initial requester, since there would be no specific labor dispute at issue, and recommended the deletion of this provision. In response to these concerns, we have revised the language to strike the phrase ''binding Department-wide opinions'' and replaced it with ''guidance,'' thus allowing the NSLRB to issue non-binding guidance. While we have struck the language that would have allowed FLRA and judicial review of this guidance, we anticipate that the guidance will be accorded deference by other third parties in the cases before them. We also received a comment suggesting that the procedures to request an opinion under this provision are confusing. We disagree and have made no changes to this process.

Commenters raised concerns about the NSLRB's authority under § 9901.908(a)(3) of the proposed regulations to resolve disputes concerning requests for information under § 9901.914(b)(5). Accordingly, we have deleted this provision. Disputes concerning denial of information requests are processed as unfair labor practices, which are included in § 9901.908(b)(1).

Commenters, including labor organizations participating in the meet-and-confer process, expressed concern with the NSLRB's authority to resolve national consultation disputes. We agree and have amended the regulations to retain FLRA jurisdiction over disputes regarding the granting of National Consultation Rights. Accordingly, we have deleted § 9901.908(a)(8) of the proposed regulations, which had reserved this authority to the NSLRB.

Some commenters expressed concern with the limitation on the Board's authority to issue *status quo ante* awards. These commenters argued that the authority to order *status quo ante* remedies to make aggrieved employees whole was essential for employees to perceive the NSLRB as legitimate. We disagree. We believe that the limitations on the award of *status quo ante* remedies appropriately recognize and correctly balance the Department's national security mission and the unique role that DoD civilian employees play in supporting that mission. We believe the limitations provided in the regulations are appropriate and have not accepted the recommendations.

A labor organization expressed concern that the Board's *de novo* review authority of an arbitrator's findings of fact made the proposed system illegitimate. We disagree. We believe it is necessary for the Board to review the underlying facts in any dispute to ensure that a correct determination has been rendered.

Commenters also recommended that we define the Board's remedial authorities. We do not believe that this is necessary, just as it was unnecessary to define the FLRA's remedial authorities under chapter 71.

Commenters also raised concerns regarding the Board's authority under § 9901.908(a)(1) and (a)(5) of the proposed regulations to decline jurisdiction over individual labor disputes. We share their concerns and have amended the proposed language to give the Board the added authority to reject unfair labor practices and negotiation impasses.

Section 9901.910—Management Rights

Commenters, including labor organizations participating in the meet-and-confer process, recommended that

we retain the current language in 5 U.S.C. chapter 71 with regard to management rights, arguing that the proposed regulations unduly limited the scope of bargaining. Specifically, commenters expressed concern that limiting collective bargaining over the assignment of equipment and shifts could compromise public safety. These commenters recommended that management retain the right to permissively bargain certain subjects when appropriate, rather than replacing the requirement to bargain with a requirement to consult with the labor organizations concurrent with taking action. Moreover, commenters suggested that labor organizations should be able to bargain appropriate arrangements prior to management taking an action that potentially could adversely affect bargaining unit employees rather than providing for post implementation bargaining. Commenters, most notably labor organizations, objected to the prohibition of bargaining procedures concerning management rights at § 9901.910(a)(1) and (2). Labor organizations also suggested that the right to negotiate procedures for management rights at § 9901.910(a)(3) is illusory. Labor organizations suggested that no justification has been provided to restrict bargaining over procedures and this restriction is contrary to law. Finally, commenters objected to the provision that allowed management to deviate from established procedures because they believe such an action is unreasonable.

Although these issues were discussed during the meet-and-confer process, the employee and management representatives were unable to fashion a recommendation to resolve these differences that would be acceptable to all parties. The labor organizations participating in the meet-and-confer process, while willing to discuss some modifications to the procedures in chapter 71, held fast to their position that the existing labor relations system only needed slight modifications to meet the Department's need for flexibility and agility to support its national security mission. We disagree with the labor organizations' suggestion that implementing issuances and issuances should be subject to an adaptation of the FLRA's compelling need standard, which requires a link between the policy to be implemented and national security, to override collective bargaining agreements. Furthermore, we believe that, even with modifications discussed with the labor organizations during the meet-and-confer process, to interpret the emergency provisions of chapter 71 more liberally and to allow post-implementation bargaining in certain limited situations, the current statute does not give the Department the flexibility necessary to carry out its vital national security mission. Today, the Department is increasingly faced with an enemy that can attack with little or no advance warning. The Department must be agile enough to respond to the emerging and rapidly evolving threats inherent in 21st century warfare.

Finally, we have modified the regulations to permit bargaining, in the sole, exclusive, unreviewable discretion of the Secretary, over the procedures that would be followed in exercising the expanded operational management rights. We have also modified the regulations to permit bargaining, at the election of the Secretary, over appropriate arrangements on the routine matters related to the expanded operational management rights. The Secretary may authorize such bargaining to advance the Department's mission accomplishment or promote organizational effectiveness. Mid-term agreements on appropriate arrangements and procedures for (a)(1) and (a)(2) management rights are not precedential or binding on subsequent acts, or retroactively applied, except at the Secretary's sole, exclusive, and unreviewable discretion. Procedures and appropriate arrangements in term agreements are binding, except that nothing will delay or prevent the Secretary from exercising his or her authority under subpart I. For example, the Secretary may authorize deviation from such agreements when it is necessary to carry out the Department's mission. This authority is comparable to what occurs today when an emergency exists.

We have also made some minor changes to the section to make technical corrections and to clarify intent. Specifically, in § 9901.910(e) we have corrected the citation from ''§ 9901.913'' to the correct citation of ''§ 9901.917.'' In response to another commenter, we have removed the ''foreseeable, substantial, and significant'' standard from § 9901.910(e)(2)(i) because it is unnecessary given the language in § 9901.917(d)(2). We have also added references to sections 9901.918 and 9901.919 to conform to the authorities in those sections for multi-unit bargaining and bargaining above the level of recognition, respectively.

Section 9901.911—Exclusive Recognition of Labor Organizations

Labor organizations recommended that we delete the section as it is duplicative of the introductory provisions in 5 U.S.C. 7111. We disagree. Although labor organization recognition remains unchanged from 5 U.S.C. chapter 71, we believe that it is important to affirmatively state in these regulations that labor organizations will be recognized under subpart I in the same manner as they are under chapter 71.

Section 9901.912—Determination of Appropriate Units for Labor Organization Representation

The proposed regulations under § 9901.912(b)(3) and (4) would exclude all employees engaged in personnel work and individuals employed in attorney positions. In response to comments received, particularly from labor organizations participating in the meet-and-confer process, which opposed these exclusions as unnecessary and overbroad, we have revised the language to reflect the current language in 5 U.S.C. chapter 71.

Although the proposed regulations did not explicitly provide special rules for bargaining unit inclusion or exclusion for employees holding security clearances, there were multiple comments on the subject. Commenters suggested that employees with security clearances should be excluded from bargaining units because of national security concerns. Labor organizations participating in the meet-and-confer process recommended an alternative approach that would require an employee with a security clearance to be excluded if that employee's duties required independent judgment in the formulation of national security policy. While we understand the complexity of the issue, we disagree with both recommendations because we believe the existing approach of case-by-case exclusion is appropriate. Given the sensitivity of the issue, we believe a universal approach to security clearance exclusion would be inflexible and ineffective.

Section 9901.913—National Consultation

Commenters, including labor organizations participating in the meet-and-confer process, recommended deleting these provisions because, in their view, they are unlawful deviations from chapter 71. We disagree for the reasons stated under *General Comments.* Commenters further recommended that the FLRA should retain jurisdiction over national consultation issues. We have adopted this recommendation and modified the language accordingly. We also received comments suggesting that the phrases

''substantial number of employees'' and ''reasonable time'' are vague. However, this is the exact language that appears in chapter 71 and the FLRA has a long history of interpreting this language. Therefore, we have retained the language.

Section 9901.914—Representation Rights and Duties

Commenters, including labor organizations participating in the meet-and-confer process, strongly objected to the elimination of the right of an employee to request representation when examined by representatives of the Office of the Inspector General and other independent Department and Component organizations whose mission includes criminal investigations. These commenters argued that such representation protects employees against abusive or illegal interview techniques and provides reassurance and guidance to employees. We agree, and have revised the regulations to eliminate these restrictions on representation.

We also received comments, including comments from labor organizations participating in the meet-and-confer process, that opposed the restrictions on the union's right to attend formal EEO proceedings. Alternatively, other commenters strongly supported this restriction. We have carefully considered the comments and have come to the conclusion that the often sensitive nature of discrimination complaints, coupled with the fact that the employee has exercised an option to not use the negotiated grievance procedure, supports this limitation on a labor organization's right to attend such discussions. We believe the procedures as described in the proposed regulations provide the best balance between the unions' institutional interest in the matter and the employee's right to privacy. Consistent with this determination, we have added clarifying language in § 9901.915(a)(2)(C).

Commenters, including labor organizations participating in the meet-and-confer process, expressed the view that there is no valid reason to restrict the union's right to attend formal discussions over operational matters. Some of these comments appear to confuse this right as it currently exists under chapter 71. Some commenters suggest that any formal meeting with employees requires an invitation for union attendance. This is clearly not the case today, and case law is clear that it must be a formal meeting where a change to existing conditions of employment is discussed. Many meetings where operational matters are discussed, such as the routine assignment of work, do not rise to the level of requiring union participation. Furthermore, we believe that allowing managers to respond to basic questions regarding conditions of employment, such as a routine question by a newer employee regarding how an overtime roster operates, should not require union participation as the manager is merely reiterating existing policy. Management and employees must be able to freely communicate on such routine matters if the Department is to operate efficiently. Furthermore, such a communication in no way diminishes the role of the union, and does not in any way authorize a manager to discuss changing these procedures without union participation. For the forgoing reasons, we have not accepted the recommendation and have retained the language as it appeared in the proposed regulation.

Labor organizations participating in the meet-and-confer process and other commenters also recommended that we retain the ''flagrant misconduct'' standard for employee conduct while serving as union officials. Commenters argued that union representatives are different than other employees because they have the right to speak, write, associate, and petition for the redress of wronged employees. However, all employees, regardless of whether they are union representatives, are expected to express their concerns in an appropriate manner, particularly in scenarios where there could be a safety or security violation. The intent is not to prevent honest and open discussion, but rather to ensure that such discussions are undertaken in a professional and courteous manner. Under the proposed standard, there is no requirement that a union representative not assert the union's position. The only conduct the revised standard is intended to stop is the rare, but utterly unacceptable use of vulgar or sexually explicit language, as well as physical intimidation by union officials. We believe the revised standard is appropriate, particularly in a military organization that has a longstanding tradition of professionalism and courtesy. We have therefore not accepted this recommendation.

Commenters, including labor organizations participating in the meet-and-confer process, objected to the limitations on management's obligation to provide information to a union under the proposed regulations. Generally these comments focused on the provisions allowing an authorized official to block the release of information if that official determines the release would compromise mission, security, or employee safety. These provisions generally codify current case law in which the right of the union to information is weighed against the rights of employees and management. This language simply clarifies the existing state of affairs. Thus, we have not adopted the recommendations to eliminate these provisions.

Several commenters also suggested that the 30-day period for agency head review was unreasonably short. The process of agency head review, including the 30-day limitation, as provided for in § 9901.914(d)(1)–(4) is based on, and adopts, the authority of heads of agencies that exists today under 5 U.S.C. 7114(c). This standard has been in effect for many years under 5 U.S.C. chapter 71 and has worked efficiently. Thus, we believe that this is sufficient time for agency head review to occur and we have retained the 30-day time frame. We have modified § 9901.914(d)(2) and (3) to conform the provisions to the revised definition of ''issuances'' that could serve as the basis for disapproval of conflicting provisions of collective bargaining agreements upon agency head approval. We have also adopted a comment to revise § 9901.914(d)(5) to clarify that agreements are unenforceable because they conflict with applicable law, rule or regulation, or issuance, rather than because an authorized agency official has made such a determination. We have added clarifying language to this paragraph in response to numerous comments regarding the impact of issuances on collective bargaining agreements. The revised language clarifies that collective bargaining agreement provisions that conflict with issuances remain in effect until expiration of the agreement at which time the agreement must be brought into conformance with the issuance.

Section 9901.916—Unfair Labor Practices

Commenters, including labor organizations participating in the meet-and-confer process, recommended that DoD should not be permitted to enforce a rule or regulation that is in conflict with a collective bargaining agreement if the agreement was in effect prior to the issuance of the rule or regulation. We agree with these recommendations to the extent that the rule or regulation is not implementing NSPS and have amended the regulations to reflect the current 5 U.S.C. 7116(a)(7) unfair labor practice with a modification to exclude implementing issuances, which under these regulations, will immediately

supersede conflicting provisions of collective bargaining agreements.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that employees or employee representatives should have more than 90 days to file an unfair labor practice with the Board. We concur and have revised the regulation to provide six months, which is consistent with the current filing limits under chapter 71. Finally, to conform this section to the changes made to § 9901.908 and to clarify the Board's authority with respect to unreviewable discretion, we have eliminated reference to the term ''charge'' and inserted instead the generic term ''allegation.'' This also supports our goal for the Board to use a single, integrated, streamlined process for resolving labor relations disputes, including unfair labor practices.

Section 9901.917—Duty To Bargain and Consult

Commenters, including labor organizations participating in the meet-and-confer process, objected to the establishment of a 30-day time limit to complete mid-term bargaining, as proposed in § 9901.917(c). We have modified this section to allow the parties, by mutual consent, to continue mid-term negotiations beyond the proposed 30-day limitation. This change to § 9901.917(c) parallels identical language in § 9901.917(b).

Additionally, based on comments made during the meet-and-confer process that it was illogical to restrict the parties' ability to seek bargaining assistance early in the process, we changed the proposed language in § 9901.917(b) and (c) to allow either party, at any time prior to going to the Board, to refer matters at impasse to FMCS or, if mutually agreeable, to another third party.

We made technical changes to the language in § 9901.917(d)(1) to conform it to the revised definitions of ''implementing issuance'' and ''issuance.'' Commenters found the § 9901.917(d)(2) limitation on bargaining to be unnecessary and unclear. First, commenters suggested that the lead phrase, ''except as otherwise provided in 910(c),'' was unnecessary. We disagree. The phrase is intended to convey that labor organizations will have a right to consult on procedures in exercising management rights at § 9901.910(a)(1) and (2) even though § 9901.917(d)(2) limits consultation to otherwise negotiable changes in conditions of employment subject to the foreseeable, substantial and significant standard. In other words, this requires consultation on procedures for these particular management rights although ''bargaining'' on procedures is prohibited at § 9901.910(b). Commenters also raised concerns about the application of the § 9901.917(d)(2) standard, given that it contains a number of undefined words and phrases, *e.g.,* ''foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.'' Commenters fear that, absent a definition of these terms and phrases, DoD management could interpret them in a way that would render employee and union rights meaningless. Commenters recommended that we delete the provision altogether and rely on the FLRA's existing *de minimis* standard. We have not adopted these suggestions. While we agree that the standard is subject to interpretation, we anticipate that a body of case law will develop to guide the parties in applying this standard, just as there is a body of case law regarding the FLRA's *de minimis* standard.

Section 9901.918—Multi-unit Bargaining

Commenters expressed concern that while unions could request multi-unit bargaining, the Secretary has sole and exclusive authority to grant such request. While we recognize this concern, we believe that the Secretary is in a unique position to determine when an issue is appropriate for multi-unit bargaining given variations in mission and organization across the Department. We are also unclear as to how one union could require another union to participate in multi-unit bargaining. We have therefore rejected recommendations to allow unions to require multi-unit bargaining. However, we have modified the language to clarify the Secretary's authority to require multi-unit bargaining.

Commenters, including labor organizations participating in the meet-and-confer process, expressed strong opinions regarding the prohibition on ratification of contracts. While we understand that ratification is an internal union process, we believe it would be untenable to give each individual bargaining unit veto power over a multi-unit agreement after the parties have reached agreement. Thus, we have adopted the recommendation to eliminate the prohibition on ratification, but added a provision that when an agreement is reached under this section, individual bargaining units may not opt out of or veto that agreement.

Section 9901.919—Collective Bargaining Above the Level of Recognition

Several comments questioned the procedures that will be used for bargaining above the level of recognition, such as the approval process for official time requested by union officials who may be under different Military Departments. In response, we have added a provision that the Department will prescribe implementing issuances on the procedures associated with collective bargaining above the level of recognition.

Commenters, including labor organizations participating in the meet-and-confer process, acknowledged that bargaining at the national level could be appropriate, under certain circumstances. They objected, however, to giving the Secretary the sole and exclusive discretion over the use of this special bargaining authority as well as the provisions requiring these negotiations to supersede all conflicting provisions of existing collective bargaining agreements. We disagree. These provisions are required by 5 U.S.C. 9902(g)(2). In addition, we believe they are necessary for effective national level bargaining.

Commenters also objected to the prohibition on ratification in § 9901.919(b)(5). Based on the same rationale relating to this issue with regard to multi-unit bargaining, we have adopted the recommendation to delete the proposed ratification language. In its place, § 9901.919(b)(5) now provides that individual labor organizations cannot opt out of, or veto, a final national level bargaining agreement.

Section 9901.920—Negotiation Impasses

Labor organizations objected to the NSLRB adjudicating negotiation impasses because they assert that the NSLRB is not an independent third party. We disagree with this assertion for the reasons discussed in the *Major Issues* section. During the meet-and-confer process, the participating labor organizations recommended using arbitrators to resolve negotiation impasses. We disagree because such a system would lead to inconsistent and inefficient results. Use of the NSLRB will, over time, result in an established body of precedent upon which both management and unions may rely.

We have made a conforming change by adding § 9901.905 to the list of sections for which the parties may submit disputed issues to the Board. We

also made a technical correction deleting a reference to judicial review for unfair labor practices involving negotiation impasses since this is already provided for in § 9901.909.

Section 9901.921—Standards of Conduct for Labor Organizations

Labor organizations objected to this section as duplicative of 5 U.S.C. chapter 71. However, we have decided to retain it to ensure that labor organizations are cognizant of applicable standards of conduct.

Section 9901.922—Grievance Procedure

Commenters recommended that the term ''administrative'' be reinserted into the description of the negotiated grievance procedure in order to retain access to judicial review. As the Government's brief in the pending case *Whitman* v. *DOT* (S. Ct. No. 04–1131) demonstrates, we do not believe the inclusion of the word ''administrative'' in chapter 71 was intended to authorize judicial review of grievances. Nonetheless, since some courts and parties have taken the position that the addition of the word ''administrative'' authorized judicial review, we have removed that term from the regulation to avoid any suggestion that this regulation would authorize judicial review. Because this change clarifies that judicial review over many issues is not available, it does not restrict an employee's right to obtain MSPB or EEOC review of adverse actions and subsequent judicial review of those decisions. Therefore, we have rejected the recommendation and retained that language as proposed.

Commenters, including the labor organizations participating in the meet-and-confer process, recommended that classification issues should be subject to the grievance procedure. However, the classification of positions generally has been excluded from the grievance procedure. We believe that consistency of classification, while always important, becomes critical as we move into a pay-for-performance environment. Subjecting classification decisions to inconsistent interpretations by arbitrators would undermine the system. This would result in a fragmented classification system throughout the Department with similarly situated employees being treated differently. Such a result would be inconsistent with the NSPS Guiding Principles and KPPs, which require that the system be credible and trusted. Therefore, we have not adopted this recommended change.

Commenters, including labor organizations participating in the meet-and-confer process recommended that pay be subject to the grievance procedure. We note that pay has almost exclusively been excluded from the grievance procedure as it has historically been covered by Governmentwide regulation or law. The exclusion of pay from the grievance procedure is in keeping with this longstanding practice as we move into a pay for performance system. As with classification, subjecting pay determinations to inconsistent arbitrator interpretations would undermine the pay system and be inconsistent with statutory requirements that the pay system be fair, credible, and transparent. Thus, we have retained the language as proposed.

Many commenters, including labor organizations participating in the meet-and-confer process, presented strong arguments that employee ratings of record should continue to be subject to the grievance procedure and binding arbitration. Most commenters expressed concern that receiving an accurate performance rating was crucial to employees because that rating will be used in determining an employee's pay. Thus, employees need a credible system to challenge ratings of record that they believe are inaccurate. We agree and have provided employees the right to grieve their performance ratings of record through the negotiated grievance procedure. Moreover, during the meet-and-confer process, the unions agreed that the use of panels, consisting of an arbitrator, a management official and a union official, to decide grievances regarding ratings of record should be an option for employees. Thus, we have modified the regulations to provide that an employee may challenge a rating of record either through the negotiated grievance procedure using either a panel or traditional arbitration. Employees also have the option of using the administrative reconsideration process as set out in § 9901.409(g).

We have also added language to reflect case law which prevents an arbitrator, or a panel, from conducting an independent evaluation of performance or otherwise substituting his or her judgment for that of a manager. We have made clear that the arbitrator or panel has no authority to determine appropriate share payouts under the pay-for-performance system, as such determinations are made by management based on the rating of record. We believe that these changes address the concerns of commenters and will serve to instill confidence in the performance rating process.

Finally, a commenter recommended that appealable adverse actions be removed from the scope of the negotiated grievance procedure because of other available forums for redress. We agree that there is a statutory right to file an appeal with the Merit Systems Protection Board (MSPB), but the option to grieve these adverse actions as an alternative to the MSPB is a well established employee right. To address the requirement that the appeals process be fair and to ensure that the Department's national security mission is considered, we have retained regulatory language ensuring uniform review and interpretation of arbitral awards and AJ decisions. Thus, we have rejected this comment.

We also made a technical change to § 9901.922(e) to assure that mixed cases processed through a negotiated grievance procedure can properly be reviewed by the Equal Employment Opportunity Commission.

Section 9901.923—Exceptions to Arbitration Awards

Labor organizations participating in the meet-and-confer process suggested that we reconsider subjecting exceptions from arbitration decisions on appealable adverse actions to the Merit Systems Protection Board for appellate review. We disagree. The Secretary must retain full authority to review an arbitrator's decision on an appealable adverse action, similar to the need to review decisions of MSPB Administrative Judges, to ensure that the arbitrator interprets NSPS and these regulations in a way that recognizes the critical mission of the Department and to ensure that deference is provided to the Department's interpretation of these regulations. This provision is designed to ensure uniformity of interpretation and application of NSPS and these regulations. Allowing direct judicial review of arbitration decisions would create an inconsistent approach in how MSPB Administrative Judges and arbitrator decisions are treated on identical matters.

Section 9901.924—Official Time

Commenters found the proposed regulations to be unclear as to how official time would be allocated among union officials from different locals when they are engaged in multi-unit and/or national level bargaining. We note that the proposed regulations provide that the Secretary will prescribe implementing issuances on the procedures and constraints associated with multi-unit bargaining. These issuances will address a variety of issues including the granting of official time. However, the comment revealed that a parallel provision for collective

bargaining above the level of recognition has been inadvertently omitted for § 9901.919. Although multi-unit bargaining may also be at the level of recognition, there are situations where it could occur above the level of recognition. Therefore, to ensure clarity, we have amended this section to provide that the Secretary will prescribe implementing issuances on the procedures and constraints associated with bargaining above the level of recognition.

Section 9901.925—Compilation and Publication of Data

Commenters recommended that this section be deleted as its sole use and purpose, in their view, is to facilitate the Board's unlawful functioning. We disagree for the reasons explained under *General Comments,* and have retained this section.

Section 9901.926—Regulations of the Board

Commenters recommended that this section be deleted as its sole purpose, in their view, is to facilitate the Board's unlawful functioning. Commenters asserted that the Board must develop its own regulations and that the Department does not have the authority to issue interim regulations for an independent Board's operation. We agree that the Board should issue its own regulations and have provided the Board with that authority. However, we believe that it would be impractical for the Board to operate without interim rules until such time as the Board issues its own regulations. Thus, we have retained the Secretary's authority to develop interim NSLRB regulations.

Section 9901.927—Continuation of Existing Laws, Recognitions, and Procedures

Commenters recommended deletion of this section on the basis that invalidation of collective bargaining agreements provisions before the expiration of their term is, in their view, unlawful. Again, we disagree for the reasons explained under *General Comments.*

Commenters also suggested that the statements concerning the continuation of existing collective bargaining agreements and labor organization recognitions are unnecessary. We disagree because we want to ensure that there is no misunderstanding that these regulations will not dissolve established bargaining units within the Department nor cancel entire collective bargaining agreements.

Section 9901.928—Savings Provisions

We received comments recommending deletion of this section because the commenters believe that excluding administrative remedies for pending grievances is contrary to law. We disagree. To the extent that an award is prospective in nature, it must comply with the applicable procedures, whether established through law, rule, regulation or collective bargaining agreement.

Next Steps

A. NSPS Implementation

1. Employee Transition Plan (Spiral Strategy)

The Secretary adopted an ''acquisition model'' to design and implement NSPS. Eligible employees will transition to NSPS in phases or ''spirals.'' The spiral concept allows the Department to introduce NSPS in successive waves—to initially deploy the new personnel system to a number of organizations so that we can manage implementation and troubleshoot, evaluate, and report on the results in a timely manner. As with any new system, especially one with the size and complexity of NSPS, we may need to make refinements as we roll it out to the rest of the workforce. The first spiral, spiral one, is limited to General Schedule (GS and GM), Acquisition Demonstration Project, and certain alternative personnel system employees. As required by 5 U.S.C. 9902(l), the NSPS HR system under 5 U.S.C. 9902(a) may be implemented to a maximum of 300,000 employees without having to make a determination that the Department has in place a performance management system that meets the criteria in 5 U.S.C. 9902(b). Spiral one will cover up to the statutory limit of 300,000 employees.

After the assessment cycle and certification of the performance management system are completed, the second spiral will deploy. Spiral two includes Federal Wage System employees, overseas employees, and other eligible employees. Spiral three will comprise the DoD labs, currently excluded by 5 U.S.C. 9902(c), should the Secretary make the determination required by that section.

2. HR and Labor Relations Transition

Transition to the HR system occurs when employees convert or spiral into NSPS. Employees covered by the HR system are under the appeals process. Upon conversion, employees will be covered by the NSPS performance management, classification, pay, reduction in force, adverse action, and appeals regulations.

The labor relations provisions will be implemented DoD-wide for all eligible DoD employees at the same time. The labor relations provisions apply to all eligible employees even if the HR system does not cover them.

B. Development of Implementing Issuances and Continuing Collaboration

The Secretary will engage in continuing collaboration with employee representatives in developing implementing issuances. This will provide employee representatives an opportunity to submit written comments and discuss their views on human resources management issues. In some areas, such as classification and pay matters, law or other agency rules have governed decisions with no avenue for labor organizations to provide input to DoD. Continuing collaboration provides an historic opportunity for employee representatives to have input into the development of the Department's human resources management system, as well as certain aspects of the adverse actions, appeals, and labor relations programs not specifically covered by these regulations. It is an opportunity for their views and interests to be heard and considered in the development process and gives the Secretary the benefit of their insight. We encourage employee representatives to take advantage of this process and the benefits it offers.

The Secretary will provide the employee representatives draft copies of implementing issuances for review and comment. If necessary and appropriate, continuing collaboration could include face-to-face meetings or any other means to exchange information and ideas. We expect continuing collaboration to begin shortly after these final regulations become effective.

C. Training

The NSPS training plan presents a comprehensive, well-planned learning strategy to prepare the DoD workforce for the transition to NSPS. The plan is grounded in the belief that participants need to be informed and educated about NSPS and trust and value it as a system that fosters accountability, respects the individual, and protects his and her rights under the law. In building the plan, the Department seeks to educate employees about NSPS, teach the skills and behaviors necessary to implement and sustain NSPS, foster support and confidence in NSPS, and facilitate the transition to a performance-based, results-oriented culture.

The plan adopts a two-fold strategy centered around two interrelated training domains: The NSPS functional domain covering the NSPS system elements contained within the human resources, labor relations, and appeals sections of the regulations; and the change management domain, which focuses on the skills, attitudes, and behaviors necessary for success under NSPS. The plan incorporates a blended learning approach featuring Web-based and classroom instruction supplemented by a variety of learning products, informational materials, and workshops to effectively reach intended audiences with engaging, accurate, and timely content.

Within the functional domain, the Department will offer specialized courses for all of the functional areas covered by the NSPS regulations, tailored for specialized audiences (*e.g.,* supervisors/managers, human resources practitioners, attorneys, and non-supervisory employees). These courses will cover pay banding, staffing flexibilities, performance management, labor relations, the appeals process, and other matters. The Department has a robust training infrastructure already in place to train and educate its personnel and will leverage that infrastructure as we implement NSPS-specific training.

Managers and supervisors, including military managers and supervisors, are key to the success of NSPS and extensive training will be given to ensure their understanding of the system and the key role they play. Courses aimed at managers and supervisors will focus heavily on the performance management aspect of NSPS. DoD's Program Executive Office is developing these courses now and will make them available to components in time to train employees in advance of NSPS implementation. Training will focus on improving skills needed for effective performance management, such as setting clear goals and expectations, communicating with employees, and linking individual expectations to the goals and objectives of the organization.

The Department is also focusing attention on change management training to address the behavioral aspects of moving to NSPS and to better prepare the workforce for the changes NSPS will bring. The behavior-based training provides the foundation for future NSPS learning activities and facilitates increased communication between supervisors and employees as they discuss and jointly develop performance objectives tied to the overall organization's mission. This is essential if this new system is to be successful. Some of the component behavior-based training has already begun, and other courses are in development and will be available to train all affected employees in advance of NSPS implementation. Course offerings include interpersonal communication, team building, and conflict management to help facilitate interaction between employees and supervisors. In addition, components continue to offer a variety of informational forums and learning activities with sponsorship and active continuing involvement by DoD's senior leadership.

The design of the pay-for-performance system includes the use of pay pools, and we will also provide training for pay pool managers covering the pay pool process, goals and objectives, authorities, funding considerations, documentation, effective panel characteristics, etc. Roles and responsibilities of the pay pool manager and participating supervisors will also be covered extensively. The training will also feature a mock pay pool panel process that takes pay pool panel members through the full assessment process to include mock payout and employee feedback. This training builds in accountability and supports the needs of both employees and managers by providing an opportunity to experience the process and identify and correct procedures prior to undergoing the actual pay pool experience.

The PEO training plan was based on our extensive experience with previous demonstration projects. Training needs will vary by individual and organization depending on their familiarity with the fundamentals of a performance-oriented work environment. The core functional training courses available will include—

- 18 hours for managers and supervisors;
- 13 hours for employees; and
- 25 to 40 hours for HR practitioners (depending on the functional area of expertise; includes training on labor relations and appeals).

Although the time spent in training represents the Secretary's commitment to preparing the workforce, it is focusing on the results and outcomes of that training, as opposed to a prescriptive ''one size fits all'' strategy.

Employees will receive functional training through three primary vehicles:

Print Materials —directed to various targeted audiences to raise awareness and educate them on key NSPS elements and performance management concepts.

Web-based Training—two hour-long courses, ''Fundamentals of NSPS'' and ''NSPS 101,'' providing introductory, on-line training delivered in a consistent manner in a self-paced, on-demand format. The ''NSPS 101'' course serves as a prerequisite for the classroom sessions.

Classroom Sessions—the primary vehicle to communicate critical information, classroom sessions are under development for employees, managers and supervisors, human resources practitioners, and labor relations practitioners. The sessions will provide key operational information on all NSPS systems elements, with particular emphasis on performance management. Topics will include the performance management cycle, developing performance objectives, performance evaluation and assessment, performance coaching, and performance-based communication. Classroom training will be conducted using a train-the-trainer strategy, with trainers who participate in a train-the-trainer program leading all classroom training.

Trainers will be provided with instructor guides and will include basic instructional content supplemented by video vignettes and interactive exercises. Classroom training is scheduled to occur on a ''just-in-time'' basis, approximately 4 to 6 weeks prior to NSPS implementation.

The Department's leadership recognizes and is committed to providing the necessary training. Secretary England, during testimony to the Senate Armed Services Committee, stated that ''[t]raining is one of the most critical elements for a smooth and successful transition to NSPS. The Department is fully committed to a comprehensive training program for our managers, supervisors and employees. All employees will be trained to understand the system, how it works, and how it will affect them.''

The necessary resources are available to provide the training. To address these requirements, the PEO allocated $2 million in FY05 and anticipates allocating another $3 million in FY06 to fund development and delivery of core NSPS training courses and delivery of the ''train-the-trainer'' sessions.

Regulatory Requirements

E.O. 12866, Regulatory Review

DoD and OPM have determined that the National Security Personnel System (NSPS) is a significant regulatory action as enacted by Section 1101 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136, November 24, 2003) because there is a significant public interest in revisions of the DoD civilian employment system.

DoD and OPM have analyzed the expected costs and benefits of NSPS to be implemented by DoD and that analysis is presented here.

Integral to the administration of the new performance-based personnel system is a commitment to the DoD workforce to the maximum extent practicable, for fiscal years 2004 through 2008, that the aggregate amount allocated for compensation of DoD employees under NSPS will not be less than if they had not been converted to NSPS. This takes into account potential step increases and rates of promotion had employees remained in their previous pay schedule. In addition, NSPS implementing issuances will provide a formula for calculating the aggregate compensation amount for fiscal years after fiscal year 2008. The formula will ensure that, to maximum extent practicable, in the aggregate, employees are not disadvantaged in the overall amount of pay available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization, changes in the mix of employees performing those functions and other changed circumstances that might impact pay levels.

Accordingly, the NSPS performance-based pay system carries with it potential implications relative to the base pay of individual employees, depending upon local labor market conditions and individual, team, and organizational performance. However, actual payroll costs under this system will be constrained by the amount budgeted for overall DoD payroll expenditures, as is the case with the present GS pay system. DoD anticipates that accessions, separations, and promotions will net out and, as with the present system, not add to the overall cost of administering the system.

The creation of the performance-based NSPS will result in some initial implementation costs, which can be expressed in two basic categories: (1) Program implementation costs and (2) NSLRB start-up costs. The program category refers to the costs associated with designing and implementing the system. This includes the start-up and operation of the Program Executive Office, executing the system design process, developing and delivering new training specifically for NSPS, conducting outreach for employees and other parties, engaging in collaboration activities with employee representatives, and modifying human resources information systems, including personnel and payroll transaction processing systems. In the areas of training and HR automated systems, the costs associated with implementing NSPS will not be extensive, since DoD has significant training and information technology infrastructures in place for current operations. DoD will not have to build new systems or delivery mechanisms, but rather will modify existing systems and approaches to accommodate changes brought about by NSPS.

The other cost category refers to the cost to establish the National Security Labor Relations Board (NSLRB). This includes typical organizational stand-up costs, as well as staffing the NSLRB with members and a professional staff. It is expected that the NSLRB will develop streamlined processes and procedures and leverage existing infrastructures and technology to minimize start-up and sustainment cost.

As has been the practice with implementing other alternative personnel systems, DoD expects to incur an initial payroll cost related to the conversion of employees to the pay banding system. This is often referred to as a within-grade-increase (WGI) ''buyout'' in which an employee's basic pay, upon conversion, is adjusted by the amount of the WGI earned to date. While this increase is paid earlier than scheduled, it represents a cost that would have been incurred under the current system at some point. However, under the NSPS final regulations, WGIs no longer exist; once under NSPS, such pay increases will be based on performance. Accordingly, the total cost of the accelerated WGI ''buyout'' should not be treated as a ''new'' cost attributed to implementation of NSPS, since it is a cost that DoD would bear under the current HR system in the absence of the enabling legislation and corresponding regulations. The portion of the buyout cost attributable to NSPS implementation is the marginal difference between paying out the earned portion of a WGI upon conversion and the cost of paying the same WGI according to the current schedule. In the absence of NSPS, WGIs would be spread out over time instead of being paid ''up front.'' The marginal cost of the accelerated payment of earned WGIs is difficult to estimate, but is not a significant factor in the cost benefit analysis for regulatory review purposes.

In addition, DoD will incur costs relating to such matters as training development, support, and execution; reprogramming automated payroll and human resources information systems; developing guiding issuances, implementation planning, scheduling, and monitoring; design, production, and distribution of communication materials; conducting employee education and communication activities; developing and conducting pay surveys to determine future pay adjustments in relation to the labor market; conducting surveys and data analysis to ensure key performance parameters are met; the establishment of the National Security Labor Relations Board (NSLRB); and the overall operation of the NSPS Program Executive Office. The extent of these costs will be directly related to the level of comprehensiveness desired by DoD.

DoD estimates the overall costs associated with implementing the new DoD HR system—including the development and implementation of a new human resources system and the creation of the NSLRB—will be approximately $158 million through 2008. Less than $100 million will be spent in any given 12-month period.

The primary benefit to the public of this new system resides in the flexibilities that will enable DoD to build a high-performance organization focused on mission accomplishment. The new job evaluation, performance-based pay and management system provides DoD with an increased ability to attract and retain a more qualified and proficient workforce. The new and improved processes in labor management relations, adverse actions, and appeals will afford DoD greater flexibility to manage its workforce in the face of constantly changing threats to the United States and to successfully support its primary mission of Defense and the Global War on Terrorism. Taken as a whole, the changes included in these final regulations will result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

Regulatory Flexibility Act

DoD and OPM have determined that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

E.O. 12988, Civil Justice Reform

This regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

E.O. 13132, Federalism

DoD and OPM have determined that these regulations will not have

federalism implications because they will apply only to Federal agencies and employees. The regulations will not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Unfunded Mandates

These regulations will not result in the expenditure by State, local, or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

List of Subjects in 5 CFR Part 9901

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Linda M. Springer,

Director, Office of Personnel Management.

Donald Rumsfeld,

Secretary, Department of Defense.

■ Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management amend title 5, Code of Federal Regulations, by establishing chapter XCIX consisting of part 9901 as follows:

CHAPTER XCIX—DEPARTMENT OF DEFENSE HUMAN RESOURCES MANAGEMENT AND LABOR RELATIONS SYSTEMS (DEPARTMENT OF DEFENSE—OFFICE OF PERSONNEL MANAGEMENT)

PART 9901—DEPARTMENT OF DEFENSE HUMAN RESOURCES MANAGEMENT AND LABOR RELATIONS SYSTEMS

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Sec.

Subpart B—Classification

General

Classification Structure

Classification Process

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Subpart C—Pay and Pay Administration

General

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Subpart F—Workforce Shaping

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Savings Provision

Subpart H—Appeals

Subpart I—Labor-Management Relations

Authority: 5 U.S.C. 9902

Subpart A—General Provisions

§ 9901.101 Purpose.

(a) This part contains regulations governing the establishment of a new human resources management system and a new labor relations system within the Department of Defense (DoD), as authorized by 5 U.S.C. 9902. Consistent with 5 U.S.C. 9902, these regulations waive or modify various statutory provisions that would otherwise be applicable to affected DoD employees. These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM).

(b)(1) This part is designed to meet a number of essential requirements for the implementation of a new human resources management system and a new labor relations system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law, including the statutory merit system principles in 5 U.S.C. 2301; value talent, performance, leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable; ensure accountability at all levels; balance human resources system interoperability with unique mission requirements; and be competitive and cost effective.

(2) The key operational characteristics and requirements of NSPS and the labor relations system, which these regulations are designed to facilitate, are as follows: *High Performing Workforce and Management*—employees and supervisors are compensated and retained based on their performance and contribution to mission; *Agile and Responsive Workforce and Management*—workforce can be easily sized, shaped, and deployed to meet changing mission requirements; *Credible and Trusted*—system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness; *Fiscally Sound*—aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance; *Supporting Infrastructure*—information technology support, and training and change management plans are available and funded; and *Schedule*—NSPS and the labor relations system will be operational and demonstrate success prior to November 2009.

§ 9901.102 Eligibility and coverage.

(a) Pursuant to the provisions of 5 U.S.C. 9902, all civilian employees of DoD are eligible for coverage under one or more of subparts B through I of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(b)—

(1) Establish or change the effective date for applying subpart I of this part to all eligible employees in accordance with 5 U.S.C. 9902(m); and

(2) With respect to subparts B through H of this part, apply these subparts to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902. However, no category of employees may be covered by subparts B, C, E, F, G, or H of this part unless that category is also covered by subpart D of this part.

(c) Until the Secretary makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible employees in organizations and functional units, those employees, will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DoD employees will be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new NSPS classification, pay, or performance management system covering Senior Executive Service (SES) members will be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance framework authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable OPM regulations. If the Secretary determines that SES members employed by DoD should be covered by classification, pay, or performance management provisions that differ substantially from the Governmentwide SES pay-for-performance framework, the Secretary and the Director will issue joint regulations consistent with all of the requirements of 5 U.S.C. 9902.

(e) At his or her sole and exclusive discretion, the Secretary may rescind the application under paragraph (b) of this section of one or more subparts of this part to a particular category of employees and prescribe implementing issuances for converting that category of employees to coverage under applicable title 5 or other applicable provisions. The Secretary will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f)(1) Notwithstanding any other provision of this part, but subject to the following conditions, the Secretary may, at his or her sole and exclusive discretion, apply one or more subparts of this part as of an effective date specified to a category of employees in organizational and functional units not currently eligible for coverage because of coverage under a system established by a provision of law outside the waivable or modifiable chapters of title 5, U.S. Code, if the provision of law outside those waivable or modifiable title 5 chapters provides discretionary authority to cover employees under a given waivable or modifiable title 5 chapter or to cover them under a separate system established by the Secretary.

(2) In applying paragraph (f)(1) of this section with respect to coverage under subparts B and C of this part, the affected employees will be converted directly to the NSPS pay system from their current pay system. The Secretary may establish conversion rules for these employees similar to the conversion rules established under § 9901.373.

§ 9901.103 Definitions.

In this part:

Band means *pay band.*

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by applicable law or regulation. For the specific purposes prescribed in § 9901.332(c) only, basic pay includes any local market supplement.

Career group means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

Contribution means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.

Day means a calendar day.

Department or *DoD* means the Department of Defense.

Director means the Director of the Office of Personnel Management.

Employee means an employee within the meaning of that term in 5 U.S.C. 2105.

Furlough means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

General Schedule or *GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

Implementing issuance(s) means a document or documents issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments to carry out a policy or procedure implementing this part. These issuances may apply Department-wide or to any part of DoD as determined by the Secretary at his or her sole and exclusive discretion. These issuances do not include internal operating guidance, handbooks, or manuals that do not change conditions of employment, as defined in § 9901.903.

Initial probationary period means the period of time, as designated by the Secretary, immediately following an employee's appointment, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

In-service probationary period, such as a supervisory probationary period, means the period of time, as designated by the Secretary, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

Labor organization means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with the Department concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by the Department; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

Mandatory removal offense (MRO) means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department's national security mission.

Military Department means the Department of the Army, the Department of the Navy, or the Department of the Air Force.

MSPB means the Merit Systems Protection Board.

National Security Personnel System (NSPS) means the human resources management system established under 5 U.S.C. 9902(a). It does not include the labor relations system established under 5 U.S.C. 9902(m).

Occupational series means a group or family of positions performing similar types of work. Occupational series are assigned a number for workforce information purposes (for example: 0110, Economist Series; 1410, Librarian Series).

OPM means the Office of Personnel Management.

Pay band or *band* means a work level and associated pay range within a pay schedule.

Pay schedule means a set of related pay bands for a specified category of employees within a career group.

Performance means accomplishment of work assignments or responsibilities and contribution to achieving organizational goals, including an employee's behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments.

Principal Staff Assistants means senior officials of the Office of the Secretary who report directly to the Secretary or Deputy Secretary of Defense.

Promotion means the movement of an employee from one pay band to a higher pay band under implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a higher level of work in NSPS.

Rating of record means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) As needed to reflect a substantial and sustained change in the employee's performance since the last rating of record as provided in implementing issuances.

Reassignment means the movement of an employee within DoD from his or her position of record to a different position or set of duties in the same or a comparable pay band under implementing issuances on a permanent or temporary/time-limited basis. This includes the movement of an employee between positions at a comparable level of work in NSPS and a non-NSPS Federal personnel system.

Reduction in band means the voluntary or involuntary movement of an employee from one pay band to a lower pay band under implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a lower level of work in NSPS.

Secretary means the Secretary of Defense, consistent with 10 U.S.C. 113.

SES means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term ''SL'' identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term ''ST'' identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Unacceptable performance means performance of an employee which fails to meet one or more performance

expectations, as amplified through work assignments or other instructions, for which the employee is held individually accountable.

§ 9901.104 Scope of authority.

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapters 31, 33, and 35, dealing with staffing, employment, and workforce shaping (as authorized by 5 U.S.C. 9902(k));

(b) Chapter 43, dealing with performance appraisal systems;

(c) Chapter 51, dealing with General Schedule job classification;

(d) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;

(e) Chapter 55, subchapter V, dealing with premium pay, except section 5545b;

(f) Chapter 71, dealing with labor relations (as authorized by 5 U.S.C. 9902(m));

(g) Chapter 75, dealing with adverse actions and certain other actions; and

(h) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

§ 9901.105 Coordination with OPM.

(a) As specified in paragraphs (b) through (e) of this section, the Secretary will advise and/or coordinate with OPM in advance, as applicable, regarding the proposed promulgation of certain implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Such pre-decisional coordination is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of the Department of Defense pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system pursuant to 5 U.S.C. chapter 11.

(b) DoD will advise OPM in advance regarding the extension of specific subparts of this part to specific categories of DoD employees under § 9901.102(b).

(c) Subpart B of this part authorizes the Secretary to establish and administer a position classification system and classify positions covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing or substantially revising career groups, occupational pay schedules, and pay bands under §§ 9901.211 and 9901.212(a);

(2) Establishing alternative or additional occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

(3) Establishing alternative or additional classification standards for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide classification standards; and

(4) Establishing the process by which DoD employees may request reconsideration of classification decisions by the Secretary under § 9901.222, to ensure compatibility between DoD and OPM procedures.

(d) Subpart C of this part authorizes the Secretary to establish and administer a compensation system for employees of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing maximum rates of basic pay and aggregate pay under § 9901.312 that exceed those established under 5 U.S.C. chapter 53;

(2) Establishing and adjusting pay ranges for occupational pay schedules and pay bands under §§ 9901.321(a), 9901.322(a) and (b), and 9901.372;

(3) Establishing and adjusting local market supplements under §§ 9901.332(a) and 9901.333;

(4) Establishing alternative or additional local market areas under § 9901.332(b) that differ from those established for General Schedule employees under 5 CFR 531.603;

(5) Establishing policies regarding starting rates of pay for newly appointed or transferred employees under §§ 9901.351 through 9901.354 and pay retention under § 9901.355;

(6) Establishing policies regarding premium pay under § 9901.361 that differ from those that exist in Governmentwide regulations; and

(7) Establishing policies regarding the student loan repayment program under § 9901.303(c) that differ from Governmentwide policies with respect to repayment amounts, service commitments, and reimbursement.

(e) Subpart E of this part authorizes the Secretary to establish and administer authorities for the examination and appointment of employees to certain organizational elements of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing alternative or additional examining procedures under § 9901.515 that differ from those applicable to the examination of applicants for appointment to the competitive and excepted service under 5 U.S.C. chapters 31 and 33, except as otherwise provided by subpart E of this part;

(2) Establishing policies and procedures for time-limited appointments under § 9901.511(d) regarding appointment duration, advertising requirements, examining procedures, the appropriate uses of time-limited employees, and the procedures under which a time-limited employee in a competitive service position maybe be converted without further competition to the career service; and

(3) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) or 9901.513 that significantly differ from Governmentwide standards.

(f) Subpart F of this part authorizes the Secretary to establish and administer a workforce shaping system for employees of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to modifying coverage, retention procedures, or appeal rights under subpart F of this part.

(g) Section 9902(l) of title 5, U.S. Code, requires the Secretary to make a determination that the Department has in place a performance management system that meets the criteria in 5 U.S.C. 9902(b) before the Secretary may apply the human resources management system established under 5 U.S.C. 9902(a) to an organization or functional unit that exceeds 300,000 civilian employees. In making this determination, the Secretary will coordinate with the Director.

(h) When a matter requiring OPM coordination is submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrence into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of the effective date of the matter. Thereafter, the Secretary and the Director may take such action(s) as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(i) The Secretary and the Director fully expect their staffs to work closely

together on the matters specified in this section, before such matters are submitted for official OPM coordination and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

§ 9901.106 Continuing collaboration.

(a) *Continuing collaboration with employee representatives.* (1) Consistent with 5 U.S.C. 9902, this section provides employee representatives with an opportunity to participate in the development of implementing issuances that carry out the provisions of this part. This process is the exclusive procedure for the participation of employee representatives in the planning, development, or implementation of the implementing issuances that carry out the provisions of this part. Therefore, this process is not subject to the requirements of 5 U.S.C. chapter 71, including but not limited to the exercise of management rights, enforcement of the duty to consult or negotiate, the duty to bargain and consult, or impasse procedures, or the requirements established by subpart I of this part, including but not limited to §§ 9901.910 (regarding the exercise of management rights), 9901.916(a)(5) (regarding enforcement of the duty to consult or negotiate), 9901.917 (regarding the duty to bargain and consult), and 9901.920 (regarding impasse procedures).

(2)(i) For the purpose of this section, the term ''employee representatives'' includes representatives of labor organizations with exclusive recognition rights for units of DoD employees, as determined pursuant to subpart I of this part.

(ii) The Secretary, at his or her sole and exclusive discretion, may determine the number of employee representatives to be engaged in the continuing collaboration process. However, each national labor organization with one or more bargaining units accorded exclusive recognition in the Department affected by an implementing issuance will be provided the opportunity to participate in the continuing collaboration process.

(iii) Each national labor organization with multiple collective bargaining units accorded exclusive recognition will determine how its units will be represented within the limitations imposed by the Secretary under paragraph (a)(2)(ii) of this section.

(3)(i) Within timeframes specified by the Secretary, employee representatives will be provided with an opportunity to submit written comments to, and to discuss their views and recommendations with, DoD officials on any proposed final draft implementing issuances. If views and recommendations are presented by employee representatives, the Secretary must consider these views and recommendations before taking final action. The Secretary will provide employee representatives a written statement of the reasons for taking the final action regarding the implementing issuance.

(ii) To the extent that the Secretary determines necessary, employee representatives will be provided with an opportunity to discuss their views with DoD officials and/or to submit written comments, at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(4) Employee representatives will be provided with access to information for their participation in the continuing collaboration process to be productive.

(5) Nothing in the continuing collaboration process will affect the right of the Secretary, Deputy Secretary, Principal Staff Assistants, or Secretaries of the Military Departments to determine the content of implementing issuances and to make them effective at any time.

(b) *Continuing collaboration with other interested organizations.* The Secretary may also establish procedures for continuing collaboration with appropriate organizations that represent the interests of a substantial number of nonbargaining unit employees.

§ 9901.107 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived, modified, or replaced to the extent authorized by 5 U.S.C. 9902 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical national security mission of the Department, and each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary. The interpretation of the regulations in this part by DoD and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this section) or in implementing issuances. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code), DoD employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DoD employees (notwithstanding coverage under subparts B through I of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521 through 4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b;

(iii) Recruitment, relocation, and retention payments under 5 U.S.C. 5753 through 5754; and

(iv) Physicians' comparability allowances under 5 U.S.C. 5948.

(2) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart H of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9901.807(f)(6).

(3) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart I of this part (dealing with labor relations), the references in section 5596 to provisions in chapter 71 are considered to be references to those particular provisions as modified by subpart I of this part.

(c) Law enforcement officer special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509) do not apply to employees who are covered by an NSPS classification and pay system established under subparts B and C of this part.

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d).

§ 9901.108 Program evaluation.

(a) The Secretary will evaluate the regulations in this part and their implementation. The Secretary will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to

provide comments on the design and results of program evaluations.

(b) Involvement of employee representatives in the evaluation process does not waive the rights of any party under applicable law or regulations.

Subpart B—Classification

General

§ 9901.201 Purpose.

(a) This subpart contains regulations establishing a classification structure and rules for covered DoD employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, in accordance with the merit principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(b) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

§ 9901.202 Coverage.

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(5) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.107, and 9901.222(d) (with respect to OPM's authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS–15, is not waived for the purpose of defining and allocating senior executive service positions under 5 U.S.C. 3132 and 3133 or applying provisions of law outside the waivable and modifiable chapters of title 5, U.S. Code—*e.g.*, 5 U.S.C. 4507 and 4507a (regarding Presidential rank awards) and 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions).

§ 9901.204 Definitions.

In this subpart:

Band means *pay band.*

Basic pay has the meaning given that term in § 9901.103.

Career group has the meaning given that term in § 9901.103.

Classification, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, career group, pay schedule, and pay band for pay and other related purposes.

Competencies has the meaning given that term in § 9901.103.

Occupational series has the meaning given that term in § 9901.103.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay schedule has the meaning given that term in § 9901.103.

Position or *job* means the duties, responsibilities, and related competency requirements that are assigned to an employee whom the Secretary approves for coverage under § 9901.202(a).

§ 9901.205 Bar on collective bargaining.

Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), any classification system established under this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the classification system, including, but not limited to coverage determinations, the design of the classification structure, and classification methods, criteria, and administrative procedures and arrangements.

Classification Structure

§ 9901.211 Career groups.

For the purpose of classifying positions, the Secretary may establish career groups based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. The Secretary will document in implementing issuances the criteria and rationale for grouping occupations or positions into career groups.

§ 9901.212 Pay schedules and pay bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, the Secretary may establish one or more pay schedules within each career group.

(b) Each pay schedule may include one or more pay bands.

(c) The Secretary will document in implementing issuances the definitions for each pay band which specify the type and range of difficulty and responsibility; qualifications or competencies; or other characteristics of the work encompassed by the pay band.

(d) The Secretary will designate qualification standards and requirements for each career group, occupational series, pay schedule, and/or pay band, as provided in § 9901.513.

Classification Process

§ 9901.221 Classification Requirements.

(a) The Secretary will develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and will make such descriptions and documentation available to affected employees.

(b) The Secretary will—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105 and 5346, or by DoD; and

(2) Apply the criteria and definitions required by §§ 9901.211 and 9901.212 to assign jobs to an appropriate career group, pay schedule, and pay band.

(c) The Secretary will establish procedures for classifying jobs and may make such inquiries of the duties, responsibilities, and qualification requirements of jobs as it considers necessary for the purpose of this section.

(d) Classification decisions become effective on the date an authorized official approves the classification. A classification decision is implemented by a personnel action. The personnel action implementing a classification decision must occur within four pay periods after the date of the decision. Except as provided for in § 9901.222(b), such decisions will be applied prospectively and do not convey any retroactive entitlements.

§ 9901.222 Reconsideration of classification decisions.

(a) An individual employee may request that DoD or OPM reconsider the classification (*i.e.*, pay system, career group, occupational series, official title, pay schedule, or pay band) of his or her official position of record at any time.

(b) The Secretary will establish implementing issuances for reviewing requests for reconsideration. Such issuances will include a provision stating that a retroactive effective date may be required only if the employee is wrongfully reduced in band.

(c) An employee may request OPM to review a DoD determination made under paragraph (a) of this section. If an employee does not request an OPM reconsideration decision, DoD's classification determination is final and not subject to further review or appeal.

(d) OPM's final determination on a request made under this section is not subject to further review or appeal.

(e) Any determination made under this section will be based on criteria issued by the Secretary or, where the Secretary has adopted an OPM classification standard, criteria issued by OPM.

Transitional Provisions

§ 9901.231 Conversion of positions and employees to the NSPS classification system.

(a) This section describes the transitional provisions that apply when DoD positions and employees initially are converted to a classification system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate system, the SL/ST system, the SES system, or such other DoD systems as may be designated by the Secretary, as provided in § 9901.202. For the purpose of this section, the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to positions and employees that become covered by the NSPS classification system as a result of a coverage determination made under § 9901.102(b)(2) and exclude employees who move from a noncovered position to a position already covered by NSPS.

(b) The Secretary will issue implementing issuances prescribing policies and procedures for converting DoD employees to a pay band upon initial implementation of the NSPS classification system. Such procedures will include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. The Secretary will convert an employee's rate of pay as provided in § 9901.373.

Subpart C—Pay and Pay Administration

General

§ 9901.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902. Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DoD.

(b) Any pay system prescribed under this subpart will be established in conjunction with the classification system described in subpart B of this part.

(c) Any pay system prescribed under this subpart will be established in conjunction with the performance management system described in subpart D of this part.

§ 9901.302 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees and positions who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(5) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) This section does not apply in determining coverage under § 9901.361 (dealing with premium pay).

§ 9901.303 Waivers.

(a) When a specified category of employees is covered under this subpart—

(1) The provisions of 5 U.S.C. chapter 53 are waived with respect to that category of employees, except as provided in § 9901.107 and paragraphs (b) and (c) of this section; and

(2) The provisions of 5 U.S.C. chapter 55, subchapter V (except section 5545b), are waived with respect to that category of employees to the extent that those employees are covered by alternative premium pay provisions established by the Secretary under § 9901.361 in lieu of the provisions in 5 U.S.C. chapter 55, subchapter V.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Sections 5311 through 5318, dealing with Executive Schedule positions;

(2) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DoD employees in health care positions covered by section 5371 in lieu of any NSPS pay system established under this subpart or the following provisions of title 5, U.S. Code: Chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to ''chapter 51'' in section 5371 is deemed to include a classification system established under subpart B of this part; and

(3) Section 5377, dealing with the critical pay authority.

(c) Section 5379 is modified. The Secretary may establish and administer a student loan repayment program for DoD employees, except that the Secretary may not make loan payments for any noncareer appointee in the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. Notwithstanding § 9901.302(a), any DoD employee otherwise covered by section 5379 is eligible for coverage under the provisions established under this paragraph, subject to a determination by the Secretary under § 9901.102(b)(2).

§ 9901.304 Definitions.

In this part:

Band means *pay band.*

Band rate range means the range of rates of basic pay (excluding any local market supplements) applicable to employees in a particular pay band, as described in § 9901.321. Each band rate range is defined by a minimum and maximum rate.

Basic pay has the meaning given that term in § 9901.103.

Bonus means an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay.

Career group has the meaning given that term in § 9901.103.

Competencies has the meaning given that term in § 9901.103.

Contribution has the meaning given that term in § 9901.103.

Contribution assessment means the determination made by the pay pool manager as to the impact, extent, and scope of contribution that the employee's performance made to the accomplishment of the organization's mission and goals.

CONUS or *Continental United States* means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Extraordinary pay increase or *EPI* means a discretionary basic pay increase or bonus to reward an employee at the highest performance level who has been assigned the maximum number of shares available under the rating and contribution scheme when the payout formula does not adequately compensate them for the employee's extraordinary performance and contribution, as described in § 9901.344(b).

Local market supplement means a geographic- and occupation-based supplement to basic pay, as described in § 9901.332.

Modal rating means, for the purpose of pay administration, the most frequent rating of record assigned to employees in the same pay band within a particular pay pool for a particular rating cycle.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay pool means the organizational elements/ units or other categories of employees that are combined for the purpose of determining performance payouts. Each employee is in only one pay pool at a time. *Pay pool* also means the amount designated for performance payouts to employees covered by a pay pool.

Pay schedule has the meaning given that term in § 9901.103.

Performance has the meaning given that term in § 9901.103.

Performance payout means the total monetary value of a performance pay increase and bonus provided under § 9901.342.

Performance share means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in multiples commensurate with the employee's performance and contribution rating level.

Performance share value means a calculated value for each performance share based on pay pool funds available and the distribution of performance shares across employees within a pay pool, expressed as a percentage or fixed dollar amount.

Promotion has the meaning given that term in § 9901.103.

Rating of record has the meaning given that term in § 9901.103.

Reassignment has the meaning given that term in § 9901.103.

Reduction in band has the meaning given that term in § 9901.103.

Standard local market supplement means the local market supplement that applies to employees in a given pay schedule or band who are stationed within a specified local market area (the boundaries of which are defined under § 9901.332(b)), unless a targeted local market supplement applies.

Targeted local market supplement means a local market supplement established to address recruitment or retention difficulties or other appropriate reasons and which applies to a defined category of employees (based on occupation or other appropriate factors) in lieu of the standard local market supplement that would otherwise apply.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.305 Bar on collective bargaining.

Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), any pay program established under authority of this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the pay program, including but not limited to coverage decisions, the design of pay structures, the setting and adjustment of pay levels, pay administration rules and policies, and administrative procedures and arrangements.

Overview of Pay System

§ 9901.311 Major features.

Through the issuance of implementing issuances, the Secretary will establish a pay system that governs the setting and adjusting of covered employees' rates of pay and the setting of covered employees' rates of premium pay. The NSPS pay system will include the following features:

(a) A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322;

(c) Policies regarding the setting and adjusting of local market supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9901.323 and 9901.334;

(e) Policies regarding performance-based pay, as described in §§ 9901.341 through 9901.345;

(f) Policies on basic pay administration, including movement between career groups, positions, pay schedules, and pay bands, as described in §§ 9901.351 through 9901.356;

(g) Linkages to employees' ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in § 9901.361.

§ 9901.312 Maximum rates.

The Secretary will establish limitations on maximum rates of basic pay and aggregate pay for covered employees.

§ 9901.313 National security compensation comparability.

(a) To the maximum extent practicable, for fiscal years 2004 through 2008, the overall amount allocated for compensation of the DoD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS, based on at a minimum—

(1) The number and mix of employees in such organizational or functional units prior to conversion of such employees to the NSPS; and

(2) Adjustments for normal step increases and rates of promotion that would have been expected, had such employees remained in their previous pay schedule.

(b) To the maximum extent practicable, implementing issuances will provide a formula for calculating the overall amount to be allocated for fiscal years beyond fiscal year 2008 for compensation of the civilian employees included in the NSPS. The formula will ensure that in the aggregate employees are not disadvantaged in terms of the overall amount of compensation available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact compensation levels.

(c) For the purpose of this section, ''compensation'' for civilian employees means basic pay, taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement

under 5 U.S.C. 5305, local market supplement under § 9901.332, or similar payment under other legal authority.

Setting and Adjusting Rate Ranges

§ 9901.321 Structure.

(a) The Secretary will establish ranges of basic pay for pay bands, with minimum and maximum rates set and adjusted as provided in § 9901.322.

(b) For each pay band within a career group, the Secretary will establish a common rate range that applies in all locations.

§ 9901.322 Setting and adjusting rate ranges.

(a) Within his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(d)(2), set and adjust the rate ranges established under § 9901.321. In determining the rate ranges, the Secretary may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted band rate ranges. Established rate ranges will be reviewed for possible adjustment at least annually.

(c) The Secretary may establish different rate ranges and provide different rate range adjustments for different pay bands.

(d) The Secretary may adjust the minimum and maximum rates of a pay band by different percentages.

§ 9901.323 Eligibility for pay increase associated with a rate range adjustment.

(a) Employees with a current rating of record above ''unacceptable'' and employees who do not have a current rating of record for the most recently completed appraisal period will receive a percentage increase in basic pay equal to the percentage by which the minimum of their rate range is increased. This section does not apply to employees receiving a retained rate under § 9901.355.

(b) Employees with a current rating of record of ''unacceptable'' will not receive a pay increase under this section.

Local Market Supplements

§ 9901.331 General.

The basic pay ranges established under §§ 9901.321 through 9901.323 may be supplemented in appropriate circumstances by local market supplements, as described in §§ 9901.332, 9901.333, and 9901.334. These supplements are expressed as a percentage of basic pay and are set and adjusted as described in § 9901.333.

§ 9901.332 Local market supplements.

(a) The Secretary may establish local market supplements that apply in specified local market areas whose boundaries are set at the Secretary's sole and exclusive discretion, subject to paragraph (b) of this section and § 9901.105(d)(4). Local market supplements apply to employees whose official duty station is located in the given local market area. The Secretary may establish standard or targeted local market supplements.

(b)(1) The establishment or modification of geographic area boundaries for standard local market supplements by the Secretary will be effected by regulations which, notwithstanding 5 U.S.C. 553(a)(2), will be promulgated in accordance with the notice and comment requirements of 5 U.S.C. 553. As provided by the non-waived provisions of 5 U.S.C. 5304(f)(2) (modified here to apply to DoD regulations issued under the authority of this paragraph), judicial review of any such regulation is limited to whether or not it was promulgated in accordance with such requirements.

(2) Notwithstanding paragraph (b)(1) of this section, the Secretary's establishment of a standard local market area boundary or boundaries identical to those used for locality pay areas established under 5 U.S.C. 5304 does not require separate DoD regulations.

(c) Local market supplements are considered basic pay for only the following purposes:

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapter 83 or 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority, including this subpart;

(4) Severance pay under 5 U.S.C. 5595;

(5) Cost-of-living allowances and post differentials under 5 U.S.C. 5941;

(6) Overseas allowances and differentials under 5 U.S.C. chapter 59, subchapter III, to the extent authorized by the Department of State;

(7) Recruitment, relocation, and retention incentives, supervisory differentials, and extended assignment incentives under 5 U.S.C. chapter 57, subchapter IV, and 5 CFR part 575;

(8) Lump-sum payments for accumulated and accrued annual leave under 5 CFR 550, subpart L;

(9) Determining the rate of basic pay upon conversion to the NSPS pay system as provided in § 9901.373(b);

(10) Other payments and adjustments authorized under this subpart as specified by implementing issuances;

(11) Other payments and adjustments under other statutory or regulatory authority for which locality-based comparability payments under 5 U.S.C. 5304 are considered part of basic pay; and

(12) Any provisions for which DoD local market supplements are treated as basic pay by law.

§ 9901.333 Setting and adjusting local market supplements.

(a) Within his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(d)(3), set and adjust local market supplements. In determining the amounts of the supplements, the Secretary will consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. chapter 59, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted local market supplements. Established supplements will be reviewed for possible adjustment at least annually in conjunction with rate range adjustments under § 9901.322.

§ 9901.334 Eligibility for pay increase associated with a supplement adjustment.

(a) When a local market supplement is adjusted under § 9901.333, employees to whom the supplement applies with a current rating of record above ''unacceptable,'' and employees who do not have a current rating of record for the most recently completed appraisal period, will receive any pay increase resulting from that adjustment.

(b) Employees with a current rating of record of ''unacceptable'' will not receive a pay increase under this section.

Performance-Based Pay

§ 9901.341 General.

Sections 9901.342 through 9901.345 describe the performance-based pay that is part of the pay system established under this subpart. These provisions are designed to provide the Secretary with the flexibility to allocate available funds to employees based on individual performance or contribution or team or organizational performance as a means of fostering a high-performance culture that supports mission accomplishment.

§ 9901.342 Performance payouts.

(a) *Overview.* (1) The NSPS pay system will be a pay-for-performance system and, when implemented, will

result in a distribution of available performance pay funds based upon individual performance, individual contribution, team or organizational performance, or a combination of those elements. The NSPS pay system will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period, except that if an appropriate rating official determines that an employee's current performance is inconsistent with that rating, that rating official may prepare a more current rating of record, consistent with § 9901.409(b). Unless otherwise provided in implementing issuances, if an employee is not eligible to have a rating of record for the current rating cycle for reasons other than those identified in paragraphs (f) and (g) of this section, such employee will not be eligible for a performance payout under this part.

(3) Pay pools will be managed by a pay pool manager and/or pay pool panel. The Secretary will define in implementing issuances the responsibilities of pay pool managers and pay pool panels to include the review of proposed rating and share assignments to ensure that employees are treated fairly and consistently and in accordance with the merit system principles.

(b) *Performance pay pools.* (1) The Secretary will issue implementing issuances for the establishment and management of pay pools for performance payouts.

(2) The Secretary may determine a percentage of pay to be included in pay pools and paid out in accordance with accompanying implementing issuances as—

(i) A performance-based pay increase;

(ii) A performance-based bonus; or

(iii) A combination of a performance-based pay increase and a performance-based bonus.

(c) *Performance shares.* (1) The Secretary will issue implementing issuances regarding the assignment of a number or range of shares for each rating of record level, subject to paragraphs (c)(2) and (c)(3) of this section. Performance shares will be used to determine performance pay increases and/or bonuses.

(2) Employees with unacceptable ratings of record will be assigned zero shares.

(3) Where the Secretary establishes a range of shares for a rating of record level, he or she will provide guidance in implementing issuances on the use of share ranges. DoD organizations will notify employees at least 90 days prior to the end of the appraisal period of the factors that may be considered in making specific share assignments. Pay pool managers and/or pay pool panels will review proposed share assignments to ensure that factors are applied consistently across the pay pool and in accordance with the merit system principles.

(d) *Performance payout.* (1) The Secretary will establish a methodology that authorized officials will use to determine the value of a performance share. A performance share may be expressed as a percentage of an employee's rate of basic pay (exclusive of local market supplements under § 9901.332) or as a fixed dollar amount, or both.

(2) To determine an individual employee's performance payout, the share value determined under paragraph (d)(1) of this section will be multiplied by the number of performance shares assigned to the employee.

(3) The Secretary may provide for the establishment of control points within a band that limit increases in the rate of basic pay. The Secretary may require that certain criteria be met for increases above a control point.

(4) A performance payout may be an increase in basic pay, a bonus, or a combination of the two. However, an increase in basic pay may not cause the employee's rate of basic pay to exceed the maximum rate or applicable control point of the employee's band rate range. Implementing issuances will provide guidance for determining the payout amount and the appropriate distribution between basic pay and bonus.

(5) The Secretary will determine the effective date(s) of increases in basic pay made under this section.

(6) Notwithstanding any other provision of this section, the Secretary will issue implementing issuances to address the circumstances under which an employee receiving a retained rate under § 9901.355 may receive a lump-sum performance payout. Any performance payout in the form of a bonus for a retained rate employee may not exceed the amount that would be received by an employee in the same pay pool with the same rating of record whose rate of pay is at the maximum rate of the same band.

(e) *Proration of performance payouts.* The Secretary will issue implementing issuances regarding the proration of performance payouts for employees who, during the period between performance payouts, are—

(1) Hired, transferred, reassigned, or promoted;

(2) In a leave-without-pay status (except as provided in paragraphs (f) and (g) of this section); or

(3) In other circumstances where prorating is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* The Secretary will issue implementing issuances regarding how to set the rate of basic pay prospectively for an employee who leaves a DoD position to perform service in the uniformed services (in accordance with 38 U.S.C. 4303 and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (*e.g.,* 38 U.S.C. 4316). The Secretary will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's DoD rating of record for the appraisal period upon which these adjustments are based. If an employee does not have a rating of record for the appraisal period serving as a basis for these adjustments, the Secretary will base such adjustments on the average basic pay increases granted to other employees in the same pay pool and pay band who received the same rating as the employee's last DoD rating of record or the modal rating, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating or when previous ratings do not convert to the NSPS rating scale, the Secretary may establish alternative procedures for determining a basic pay increase under this section.

(g) *Adjustments for employees returning to duty after being in workers' compensation status.* The Secretary will issue implementing issuances regarding how to set the rate of basic pay prospectively for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee). For the intervening period, the Secretary will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's DoD rating of record for the appraisal period upon which these adjustments are based. If an employee does not have a rating of record for the appraisal period serving as a basis for these adjustments, such adjustments

will be based on the average basic pay increases granted to other employees in the same pay pool and pay band who received the same rating as the employee's last DoD rating of record or the modal rating, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating or when previous ratings do not convert to the NSPS rating scale, the Secretary may establish alternative procedures for determining a basic pay increase under this section.

§ 9901.343 Pay reduction based on unacceptable performance and/or conduct.

An employee's rate of basic pay may be reduced based on a determination of unacceptable performance, conduct, or both. Such reduction may not exceed 10 percent unless the employee has been changed to a lower pay band and a greater reduction is needed to set the employee's pay at the maximum rate of the pay band. (See also §§ 9901.352 and 9901.354.) An employee's rate of basic pay may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

§ 9901.344 Other performance payments.

(a) In accordance with implementing issuances authorized officials may make other payments to—

(1) Recognize organizational or team achievement;

(2) Reward extraordinary individual performance through an extraordinary pay increase (EPI), as described in paragraph (b) of this section; and

(3) Provide for other special circumstances.

(b) An EPI is paid in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. The future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

§ 9901.345 Treatment of developmental positions.

The Secretary may issue implementing issuances regarding pay increases for developmental positions. These issuances may require employees to meet certain standardized assessment or certification points as part of a formal training/developmental program. The Secretary may provide adjustments under this section in lieu of or in addition to adjustments under § 9901.342.

Pay Administration

§ 9901.351 Setting an employee's starting pay.

Subject to implementing issuances, the Secretary may set the starting rate of pay for individuals who are newly appointed or reappointed to the Federal service anywhere within the assigned pay band.

§ 9901.352 Setting pay upon reassignment.

(a) Subject to paragraphs (b) and (c) of this section and subject to implementing issuances, the Secretary may set pay anywhere within the assigned pay band when an employee is reassigned, either voluntarily or involuntarily, to a position in the same or comparable pay band.

(b) Subject to the adverse action procedures set forth in subpart G of this part and implementing issuances (or other appropriate adverse action procedures for employees not covered by subpart G of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), the Secretary may reduce an employee's rate of basic pay within a pay band for unacceptable performance and/or conduct. A reduction in pay under this paragraph may not be more than 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employee's pay band. Such a reduction may be made effective at any time.

(c) The Secretary will prescribe policies in implementing issuances regarding setting pay for an employee whose pay is reduced involuntarily, but not through adverse action procedures. In the case of completion of a temporary reassignment or failure to successfully complete an in-service probationary period, the employee's rate of basic pay will be set at the same rate the employee received prior to the temporary reassignment or placement in the position requiring the probationary period, with appropriate adjustment of the employee's rate of basic pay based on rate range increases or performance payouts that occurred during the time the employee was assigned to the new position. Any resulting reduction in basic pay is not considered an adverse action under subpart G of this part (or similar authority).

§ 9901.353 Setting pay upon promotion.

Except as otherwise provided in implementing issuances, upon an employee's promotion, the employee will receive an increase in his or her rate of basic pay equal to at least 6 percent, unless this minimum increase results in a rate of basic pay higher than the maximum rate of the applicable pay band. An employee's rate of basic pay upon promotion may not be less than the minimum of the rate range.

§ 9901.354 Setting pay upon reduction in band.

(a) Subject to paragraphs (b) and (c) of this section, pay may be set anywhere within the assigned pay band when an employee is reduced in band, either voluntarily or involuntarily. As applicable, pay retention provisions established under § 9901.355 will apply.

(b) Subject to the adverse action procedures set forth in subpart G of this part (or other appropriate adverse action procedures for employees not covered by subpart G of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), the Secretary may assign an employee involuntarily to a position in a lower pay band for unacceptable performance and/or conduct, and may simultaneously reduce the employee's rate of basic pay. A reduction in basic pay under this paragraph may not cause an employee's rate of basic pay to fall below the minimum rate of the employee's new pay band, or be more than 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

(c) The Secretary will prescribe policies in implementing issuances regarding setting pay for an employee who is reduced in band involuntarily, but not through adverse action procedures. In the case of termination of a temporary promotion or failure to successfully complete an in-service probationary period, the employee's rate of basic pay will be set at the same rate the employee received prior to the temporary promotion or placement in the position requiring the probationary period, with appropriate adjustment of the employee's rate of basic pay based on rate range increases or performance payouts that occurred during the time the employee was assigned to the new position. Any resulting reduction in basic pay is not considered an adverse action under subpart G of this part (or similar authority).

§ 9901.355 Pay retention.

(a) Subject to the requirements of this section, the Secretary will issue implementing issuances regarding pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay within the employee's new pay band or by establishing a retained rate that exceeds

the maximum rate of the new pay band. Local market supplements are not considered part of basic pay in applying pay retention.

(b) Pay retention will be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of basic pay applicable to the employee's position.

(c) Subject to any employee eligibility requirements the Secretary may prescribe, pay retention will apply when an employee is reduced in band through reduction in force (RIF), reclassification, or other appropriate circumstances, as specified in implementing issuances. Pay retention will be granted for a period of 2 years (that is, 104 weeks).

(d) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than salary adjustments, as provided in § 9901.342(d)(6).

(e) Employees entitled to a retained rate will not receive minimum rate range adjustments under § 9901.323(a), but are entitled to receive any applicable local market supplement adjustments under § 9901.334(a).

§ 9901.356 Miscellaneous.

(a) Except in the case of an employee who does not receive a pay increase under § 9901.323 because of an unacceptable rating of record, an employee's rate of basic pay may not be less than the minimum rate of the employee's pay band.

(b) Except as provided in § 9901.355, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) The Secretary will follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay will be converted to hourly rates of pay in computing payments received by covered employees.

(d) The Secretary may promulgate implementing issuances that provide for a special increase prior to an employee's movement in recognition of the fact that the employee will not be eligible for a promotion increase under the GS system, if a DoD employee moves from the pay system established under this subpart to a GS position having a higher level of duties and responsibilities.

Premium Pay

§ 9901.361 General.

(a) This section applies to eligible DoD employees and positions which would otherwise be covered by 5 U.S.C. chapter 55, subchapter V, subject to a determination by the Secretary under § 9901.102(b)(2). As provided in § 9901.303(a)(2), for employees covered by such a determination, the provisions of 5 U.S.C. chapter 55, subchapter V (except section 5545b), are waived or modified to the extent that the Secretary establishes alternative premium pay provisions for such employees in lieu of the provisions in 5 U.S.C. chapter 55, subchapter V.

(b) The Secretary may establish alternative or additional forms of premium pay, or make modifications in premium payments under 5 U.S.C. chapter 55, subchapter V (except section 5545b), for specified categories of employees through implementing issuances. The types of premium payments the Secretary may establish or modify include, but are not limited to—

(1) Overtime pay (excluding overtime pay under the Fair Labor Standards Act);

(2) Compensatory time off;

(3) Sunday, holiday, and night pay;

(4) Annual premium pay for standby duty and administratively uncontrollable overtime work;

(5) Availability pay for criminal investigators; and

(6) Hazardous duty differentials.

(c) The Secretary will determine the conditions of eligibility for the amounts of and the limitations on payments made under the authority of this section.

Conversion Provisions

§ 9901.371 General.

(a) This section and §§ 9901.372 and 9901.373 describe the provisions that apply when DoD employees are converted to the NSPS pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system (or such other systems designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902), as provided in § 9901.302. For the purpose of this section and §§ 9901.372 and 9901.373, the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to employees who become covered by the pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)(2)) and exclude employees who move from a noncovered position to a position already covered by the NSPS pay system.

(b) The Secretary will issue implementing issuances prescribing the policies and procedures necessary to implement these transitional provisions.

§ 9901.372 Creating initial pay ranges.

DoD will set the initial band rate ranges for the NSPS pay system established under this subpart. The initial ranges may link to the ranges that apply to converted employees in their previously applicable pay system (taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or similar payment under other legal authority).

§ 9901.373 Conversion of employees to the NSPS pay system.

(a) When the NSPS pay system is established under this subpart and applied to a category of employees, employees will be converted to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or similar payment under other legal authority).

(b) When an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the NSPS pay system that consists of a basic rate and a local market supplement, the conversion is not a reduction in pay for the purpose of applying subpart G of this part (or similar authority).

(c) If another personnel action (*e.g.*, promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, the other action will be processed under the rules pertaining to the employee's former system before processing the conversion action.

(d) An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion. If the employee is temporarily promoted immediately after the conversion, pay will be set under the rules for promotion increases under the NSPS pay system.

(e) The Secretary has discretion to make one-time pay adjustments for employees when they are converted to the NSPS pay system. The Secretary will issue implementing issuances governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

Subpart D—Performance Management

§ 9901.401 Purpose.

(a) This subpart provides for the establishment in DoD of a performance

management system as authorized by 5 U.S.C. 9902.

(b) The performance management system established under this subpart is designed to promote and sustain a high-performance culture by incorporating the following elements:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between the performance management system and DoD's strategic plan;

(4) A means for ensuring employee involvement in the design and implementation of the system;

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) A process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

(8) A means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and

(9) A pay-for-performance evaluation system to better link individual pay to performance, and provide an equitable method for appraising and compensating employees.

§ 9901.402 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2), except as provided in paragraph (c) of this section.

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 43;

(2) Employees and positions who were excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart; and

(3) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) This subpart does not apply to employees who have been, or are expected to be, employed in an NSPS position for less than a minimum period (as defined in § 9901.404) during a single 12-month period.

§ 9901.403 Waivers.

When a specified category or group of employees is covered by the performance management system(s) established under this subpart, the provisions of 5 U.S.C. chapter 43 are waived with respect to that category of employees.

§ 9901.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period means the period of time established under a performance management system for reviewing employee performance.

Competencies has the meaning given that term in § 9901.103.

Contribution has the meaning given that term in § 9901.103.

Minimum period means the period of time established by the Secretary during which an employee will perform under applicable performance expectations before receiving a rating of record.

Pay-for-performance evaluation system means the performance management system established under this subpart to link individual pay to performance and provide an equitable method for appraising and compensating employees.

Performance has the meaning given that term in § 9901.103.

Performance expectations means the duties, responsibilities, and competencies required by, or objectives associated with, an employee's position and the contributions and demonstrated competencies management expects of an employee, as described in § 9901.406(d).

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by implementing issuances, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance. It incorporates the elements set forth in § 9901.401(b).

Rating of record has the meaning given that term in § 9901.103.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.405 Performance management system requirements.

(a) The Secretary will issue implementing issuances that establish a performance management system for DoD employees, subject to the requirements set forth in this subpart.

(b) The NSPS performance management system will—

(1) Specify the employees covered by the system(s);

(2) Provide for the appraisal of the performance of each employee at least annually;

(3) Specify the minimum period during which an employee will perform before being eligible to receive a rating of record;

(4) Hold supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(5) Specify procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(6) Specify the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers are responsible for—

(1) Clearly communicating performance expectations and holding employees responsible for accomplishing them;

(2) Making meaningful distinctions among employees based on performance and contribution;

(3) Fostering and rewarding excellent performance;

(4) Addressing poor performance; and

(5) Assuring that employees are assigned a rating of record when required by implementing issuances.

§ 9901.406 Setting and communicating performance expectations.

(a) Performance expectations will support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Performance expectations will be communicated in writing, including those that may affect an employee's retention in the job. Performance expectations will be communicated to the employee prior to holding the employee accountable for them.

However, notwithstanding this requirement, employees are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others.

(c) Performance expectations for supervisors and managers will include assessment and measurements of how well supervisors and managers plan, monitor, develop, correct, and assess subordinate employees' performance.

(d) Performance expectations may include—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee; and

(3) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make.

(e) Performance expectations may be amplified through particular work assignments or other instructions (which may specify the quality, quantity, accuracy, timeliness, or other expected characteristics of the completed assignment, or some combination of such characteristics). Such assignments and instructions need not be in writing.

(f) Supervisors will involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

§ 9901.407 Monitoring performance and providing feedback.

In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(a) Monitor the performance of their employees and their contribution to the organization; and

(b) Provide ongoing (*i.e.,* regular and timely) feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period.

§ 9901.408 Developing performance and addressing poor performance.

(a) Implementing issuances will prescribe procedures that supervisors will use to develop employee performance and to address poor performance.

(b) If at any time during the appraisal period a supervisor determines that an employee's performance is unacceptable, the supervisor will—

(1) Consider the range of options available to address the performance deficiency, which include, but are not limited to, remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action as defined in subpart G of this part, including a reduction in rate of basic pay or pay band; and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart H of this part (or other appropriate appeal procedures, if not covered by subpart H of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), employees may appeal adverse actions (*e.g.,* suspensions of more than 14 days, reductions in pay and pay band, and removal) based on unacceptable performance and/or conduct.

§ 9901.409 Rating and rewarding performance.

(a) The NSPS performance management system will establish a multi-level rating system as described in the implementing issuances.

(b) An appropriate rating official will prepare and issue a rating of record after the completion of the appraisal period. In accordance with implementing issuances, an additional rating of record may be issued to reflect a substantial and sustained change in the employee's performance since the last rating of record. A rating of record will be used as a basis for—

(1) A pay determination under any applicable pay rules;

(2) Determining reduction in force retention standing; and

(3) Such other action that the Secretary considers appropriate, as specified in implementing issuances.

(c) A rating of record will assess an employee's performance with respect to his or her performance expectations, as amplified through work assignments or other instructions, and/or relative contributions and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) An appropriate rating official will communicate the rating of record and number of shares to the employee prior to payout.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required. Ratings of record will be transferred between subordinate organizations and to other Federal departments or agencies in accordance with implementing issuances.

(f) The Secretary may not lower the rating of record of an employee based on an approved absence from work, including the absence of a disabled veteran to seek medical treatment as provided in Executive Order 5396.

(g) A rating of record may be challenged by a nonbargaining unit employee only through a reconsideration process as provided in implementing issuances. This process will be the sole and exclusive method for all nonbargaining unit employees to challenge a rating of record. A payout determination will not be subject to the reconsideration process.

(h) A bargaining unit employee may choose a negotiated grievance procedure or the administrative reconsideration process established under paragraph (g) of this section, but not both, to challenge his or her rating of record. An employee who chooses the administrative reconsideration process may not revert to a negotiated grievance procedure. A payout determination will not be subject to the negotiated grievance procedure. Any individual or panel reviewing a rating of record under a negotiated grievance procedure may not conduct an independent evaluation of the employee's performance, determine the appropriate share payout, or otherwise substitute his or her judgment for that of the rating official.

(i) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in the applicable performance management system (*e.g.,* transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(j) Implementing issuances will establish policies and procedures for crediting performance in a reduction in force in accordance with subpart F of this part (or other appropriate workforce shaping procedures for those not covered by subpart F of this part, such as National Guard Technicians under 32 U.S.C. 709).

Subpart E—Staffing and Employment

General

§ 9901.501 Purpose.

(a) This subpart sets forth policies and procedures for the establishment of qualification requirements; recruitment

for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (k).

(b) The Secretary will comply with merit principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) The Secretary will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(a) and (k).

§ 9901.502 Scope of authority.

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C. 3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321, 3324, 3325, 3327, 3330, 3341, and 5112(a) are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, the Secretary will prescribe implementing issuances to carry out the provisions of this subpart.

§ 9901.503 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b).

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapters 31 and 33 (excluding members of the Senior Executive Service); and

(2) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.504 Definitions.

In this subpart—

Career employee means an individual appointed without time limit to a competitive or excepted service position in the Federal career service.

Initial probationary period has the meaning given that term in § 9901.103.

In-service probationary period has the meaning given that term in § 9901.103.

Promotion has the meaning given that term in § 9901.103.

Reassignment has the meaning given that term in § 9901.103.

Reduction in band has the meaning given that term in § 9901.103.

Temporary employee means an individual not on a career appointment who is employed for a limited period of time not to exceed 1 year. The appointment may be extended, up to a maximum established by implementing issuances, to perform the work of a position that does not require an additional permanent employee.

Term employee means an individual not on a career appointment who is employed for a period of more than 1 year up to a maximum established by implementing issuances, when the need for an employee's service is not permanent.

Time-limited employee means an individual appointed to a position for a period of limited duration (e.g., term or temporary) in either the competitive or excepted service.

External Recruitment and Internal Placement

§ 9901.511 Appointing authorities.

(a) *Competitive and excepted appointing authorities.* The Secretary may continue to use excepted and competitive appointing authorities and entitlements under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals will be given career or time-limited appointments, as appropriate.

(b) *Additional appointing authorities.* (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2)(i) DoD and OPM will jointly publish a notice in the **Federal Register** when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive position in the career service. DoD and OPM will issue a notice with a public comment period before establishing such authority, except as provided in paragraph (b)(2)(ii) of this section.

(ii) If the Secretary determines that a critical mission requirement exists, DoD and OPM may establish a new appointing authority as described in paragraph (b)(2)(i) of this section effective upon publication of a **Federal Register** notice without a preceding comment period. However, the notice will invite public comments, and DoD and OPM will issue another notice if the authority is revised based on those comments.

(3) The Secretary will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, a consolidated list of all appointing authorities established under this section and currently in effect will be published in the **Federal Register**.

(c) *Severe shortage/critical need hiring authority.* (1) The Secretary may determine that there is a severe shortage of candidates or a critical hiring need, as defined in 5 U.S.C. 3304(a)(3) and 5 CFR part 337, subpart B, for particular occupations, pay bands, career groups, and/or geographic locations, and establish a specific authority to make appointments without regard to § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, the Secretary will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) The Secretary will terminate or modify a specific authority to make appointments under this section when it determines that the severe shortage or critical need upon which the authority was based no longer exists.

(4) The Secretary will prescribe appropriate implementing issuances to administer this authority and will notify OPM of determinations made under this section.

(d) *Time-limited appointing authorities.* (1) The Secretary may prescribe the procedures for appointing employees, the duration of such appointments, and the appropriate uses of time-limited employees. These procedures will preclude the use of employees on term appointments in positions that should be filled on a permanent basis. Term appointments may be used to accomplish permanent work in circumstances where the position cannot be filled permanently, *e.g.*, the incumbent will be out of the position for a significant period of time, but is expected to return.

(2) The Secretary will prescribe implementing issuances establishing the procedures under which a time-limited employee serving in a competitive service position may be converted without further competition to the career service if—

(i) The vacancy announcement met the requirements of § 9901.515(a) and included the possibility of noncompetitive conversion to a competitive position in the career service at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in § 9901.515(b) and (c); and

(iii) The employee completed at least 2 years of continuous service at the fully successful level of performance or better.

§ 9901.512 Probationary periods.

(a) The Secretary may establish initial probationary periods of at least 1 year, but not to exceed 3 years, as deemed appropriate for employees appointed to positions in the competitive and excepted service covered by NSPS. The Secretary will prescribe the conditions for such periods, such as creditable service, in implementing issuances. Initial probationary periods established for more than 1 year will be applied to categories of positions or types of work that require a longer time period to evaluate the employee's ability to perform the work. A preference eligible who has completed 1 year of an initial probationary period is covered by subparts G and H of this part.

(b) The Secretary may establish in-service probationary periods. The Secretary will prescribe the conditions for such periods, such as creditable service and groups of positions or occupations to be covered, in implementing issuances. An employee who does not satisfactorily complete an in-service probationary period will be returned to a grade or band no lower than that held before the in-service probationary period and will have his or her rate of basic pay set in accordance with § 9901.352(c) or 9901.354(c), as applicable. Nothing in this section prohibits an action against an individual serving an in-service probationary period for cause unrelated to performance.

§ 9901.513 Qualification standards.

The Secretary may continue to use qualification standards established or approved by OPM. The Secretary also may establish qualification standards for positions covered by NSPS.

§ 9901.514 Non-citizen hiring.

The Secretary may establish procedures for appointing non-citizens to positions within NSPS under the following conditions:

(a) In the absence of a qualified U.S. citizen, the Secretary may appoint a qualified non-citizen in the excepted service; and

(b) Immigration and security requirements will apply to these appointments.

§ 9901.515 Competitive examining procedures.

(a) In recruiting applicants from outside of the civil service for competitive appointments to competitive service positions in NSPS, the Secretary will provide public notice for all vacancies in the career service in accordance with 5 CFR part 330 and—

(1) Will accept applications for the vacant position from all U.S. citizens;

(2) Will, at a minimum, consider applicants from the local commuting area;

(3) May concurrently consider applicants from other targeted recruitment areas, as specified in the vacancy announcement, in addition to those applicants from the minimum area of consideration; and

(4) May consider applicants from outside that minimum area(s) of consideration as necessary to provide sufficient qualified candidates.

(b) The Secretary may establish procedures for the examination of applicants for entry into competitive and excepted service positions in the National Security Personnel System. Such procedures will adhere to the merit system principles in 5 U.S.C. 2301 and veterans' preference requirements as set forth in 5 U.S.C. 1302(b) and (c) and 3309 through 3320, as applicable, and will be available in writing for applicant review. These procedures will also include provisions for employees entitled to priority consideration referred to in 5 U.S.C. 8151.

(c) In establishing examining procedures for appointing employees in the competitive service under paragraph (b) of this section, the Secretary may use traditional numerical rating and ranking or alternative ranking and selection procedures (category rating) in accordance with 5 U.S.C. 3319(b) and (c).

(d) The Secretary will apply the requirements of paragraphs (a) through (c) of this section to the recruitment of applicants for time-limited positions in the competitive service in order to qualify an appointee for noncompetitive conversion to a competitive position in the career service, in accordance with § 9901.511.

§ 9901.516 Internal placement.

The Secretary may prescribe implementing issuances regarding the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS. Such implementing issuances will be made available to applicants and employees. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures. Those exceptions to competitive procedures set forth in 5 CFR part 335 apply to NSPS.

Subpart F—Workforce Shaping

§ 9901.601 Purpose and applicability.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9902(k) concerning the Department's system for realigning, reorganizing, and reshaping its workforce. This subpart applies to categories of positions and employees affected by such actions resulting from the planned elimination, addition, or redistribution of functions, duties, or skills within or among organizational units, including realigning, reshaping, delayering, and similar organizational-based restructuring actions. This subpart does not apply to actions involving the conduct and/or performance of individual employees, which are covered by subpart G of this part.

§ 9901.602 Scope of authority.

When a specified category of employees is covered by the system established under this subpart, the provisions of 5 U.S.C. 3501 through 3503 (except with respect to veterans' preference) are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, the Secretary will prescribe implementing issuances to carry out the provisions of this subpart.

§ 9901.603 Definitions.

In this subpart:

Competing employee means a career employee (including an employee serving an initial probationary period), an employee serving on a term appointment, and other employees as identified in implementing issuances.

Competitive area means the boundaries within which employees compete for retention under this subpart, based on factors described in § 9901.605(a).

Competitive group means employees within a competitive area who are on a common retention list for the purpose of exercising displacement rights.

Displacement right means the right of an employee who is displaced from his or her present position because of position abolishment, or because of displacement resulting from the abolishment of a higher-standing employee on the retention list, to displace a lower-standing employee on the list on the basis of the retention factors.

Modal rating means, for the purpose of reduction in force, the rating of record that occurs most frequently in a particular competitive group.

Notice means a written communication to an individual

employee stating that the employee will be displaced from his or her position as a result of a reduction in force action under this subpart.

Rating of record has the meaning given that term in § 9901.103.

Retention factors means tenure, veterans' preference, performance, length of service, and such other factors as the Secretary considers necessary and appropriate to rank employees within a particular retention list.

Retention list means a list of all competing employees occupying positions in the competitive area, who are grouped in the same competitive group on the basis of retention factors. While all positions in the competitive group are listed, only competing employees have retention standing.

Tenure group means a group of employees with a given appointment type. In a reduction in force, employees are first placed in a tenure group and then ranked within that group according to other retention factors.

Undue interruption means a degree of interruption that would prevent the completion of required work by an employee within 90 days after the employee has been placed in a different position.

§ 9901.604 Coverage.

(a) *Employees covered.* The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 35 (excluding members of the Senior Executive Service and employees who are excluded from coverage by other statutory authority); and

(2) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(b) *Actions covered.* (1) *Reduction in force.* This subpart will apply when a displacement action occurs within a retention list or when releasing a competing employee from a retention list by separation, reduction in band, or assignment involving displacement, and the release results from an action described in § 9901.601.

(2) *Transfer of function.* The Secretary will issue implementing issuances consistent with 5 U.S.C. 3503 prescribing procedures to be used when a function transfers from one competitive area to a different competitive area.

(3) *Furlough.* The provisions in 5 CFR 351.604 will apply when furloughing a competing employee for more than 30 consecutive calendar days, or more than 22 workdays in 1 calendar year if done on a discontinuous basis, except as otherwise provided in this subpart.

(c) *Actions excluded.* This subpart does not apply to—

(1) The termination of a temporary promotion or temporary reassignment and the subsequent return of an employee to the position held before the temporary promotion or temporary reassignment (or to a position with comparable pay band, pay, status, and tenure);

(2) A reduction in band based on the reclassification of an employee's position due to the application of new classification standards or the correction of a classification error or classification actions covered under § 9901.222;

(3) Placement of an employee serving on a seasonal basis in a nonpay, nonduty status in accordance with conditions established at time of appointment;

(4) A change in an employee's work schedule from other-than-full-time to full-time;

(5) A change in an employee's mixed tour work schedule in accordance with conditions established at time of appointment;

(6) A change in the scheduled tour of duty of an other-than-full-time schedule;

(7) A reduction in band based on the reclassification of an employee's position due to erosion of duties, except that this exclusion does not apply to such reclassification actions that will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days; or

(8) Any other personnel action not covered by paragraph (b) of this section.

§ 9901.605 Competitive area.

(a) *Basis for competitive area.* The Secretary may establish a competitive area on the basis of one or more of the following considerations:

(1) Geographical location(s);

(2) Line(s) of business;

(3) Product line(s);

(4) Organizational unit(s); and

(5) Funding line(s).

(b) *Employees included in competitive area.* A competitive area will include all competing employees holding official positions of record in the defined competitive area.

(c) *Review of competitive area determinations.* The Secretary will make all competitive area definitions available for review.

(d) *Change of competitive area.* Competitive areas will be established for a minimum of 90 days before the effective date of a reduction in force. In implementing issuances, the Secretary will establish approval procedure requirements for any competitive area identified less than 90 days before the effective date of a reduction in force.

(e) *Limitations.* The Secretary will establish a competitive area only on the basis of legitimate organizational reasons, and competitive areas will not be used for the purpose of targeting an individual employee for reduction in forces on the basis of nonmerit factors.

(f) *Bar on collective bargaining.* Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), the establishment of a competitive area under the authority of this subpart is not subject to collective bargaining.

§ 9901.606 Competitive group.

(a) The Secretary will establish separate competitive groups for employees—

(1) In the excepted and competitive service;

(2) Under different excepted service appointment authorities; and

(3) With different work schedules (*e.g.,* full-time, part-time, seasonal, intermittent).

(b) The Secretary may further define competitive groups on the basis of one or more of the following considerations:

(1) Career group;

(2) Pay schedule;

(3) Occupational series or specialty;

(4) Pay band; or

(5) Trainee status.

(c) An employee is placed into a competitive group based on the employee's official position of record. An employee's official position description may be supplemented with other applicable records that document the employee's actual duties and responsibilities.

(d) The competitive group includes the official positions of employees on a detail or other nonpermanent assignment to a different position from the competitive group.

(e) Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), the establishment of a competitive group under the authority of this subpart is not subject to collective bargaining.

§ 9901.607 Retention standing.

(a) *Retention list.* Within each competitive group, the Secretary will establish a retention list of competing employees in descending order based on the following:

(1) Tenure, with career employees listed first, followed by employees serving an initial probationary period, and then followed by employees on term appointments and other employees as identified in implementing issuances;

(2) Veterans' preference, in accordance with the preference requirements in 5 CFR 351.501(c) and (d), including the preference restrictions found in 5 U.S.C. 3501(a);

(3) The ratings of record, as determined in accordance with implementing issuances;

(4) Creditable civilian and/or uniformed service in accordance with 5 U.S.C. 3502(a)(A) and (B) and 5 CFR 351.503, but without regard to provisions covering additional service credit for performance in 5 CFR 351.503(c)(3) and (e); and

(5) The Secretary may establish tie-breaking procedures when two or more employees have the same retention standing.

(b) *Active uniformed service member not on list.* The retention list does not include the name of an employee who, on the effective date of the reduction in force, is on active duty in the uniformed services with a restoration right under 5 CFR part 353.

(c) *Access to retention list.* An employee who received a specific reduction in force notice and the employee's representative have access to the applicable retention list in accordance with 5 CFR 351.505. Where 5 CFR 351.505 uses the terms ''competitive level'' or ''retention register,'' the term *retention list* (as defined in this subpart) is substituted.

§ 9901.608 Displacement, release, and position offers.

(a) *Displacement to other positions on the retention list.* (1) An employee who is displaced because of position abolishment, or because of displacement resulting from the abolishment of the position of a higher-standing employee on the retention list, may displace a lower-standing employee on the list if—

(i) The higher-standing employee is qualified for the position consistent, as applicable, with 5 CFR 351.702, or the Department's own qualifications applied consistent with other requirements in 5 CFR 351.702;

(ii) No undue interruption would result from the displacement; and

(iii) The position of the lower-standing employee is in the same pay band, or in a lower pay band, as the position of the higher-standing employee.

(2) A displacing employee retains his or her status and tenure.

(b) *Release from the retention list.* (1) Employees are selected for release from the list on the basis of the ascending order of retention standing set forth in § 9901.607(a).

(2) A competing employee may not be released from a retention list that contains a position held by a temporary employee when the competing employee is qualified to perform in that position under § 9901.608(a)(1)(i).

(3) The release of an employee from the retention list may be temporarily postponed when appropriate under 5 CFR 351.506, 351.606, 351.607, and 351.608. Where part 351 uses the term ''competitive level'' in these four sections, the term *retention list* (as defined in this subpart) is substituted.

(c) *Placement in vacant positions.* At the Secretary's option, an employee affected by § 9901.608(a)(1) may be offered a vacant position within the competitive area in lieu of reduction in force, based on relative retention standing as specified in § 9901.607(a).

(d) *Actions for employees with no offer.* If a released employee does not receive an offer of another position under paragraph (c) of this section to a position on a different retention list, the Secretary may—

(1) Separate the employee by reduction in force; or

(2) Furlough the employee under § 9901.604(b)(3).

§ 9901.609 Reduction in force notices.

The Secretary will provide a specific written notice to each employee reached for an action in reduction in force competition at least 60 days before the reduction in force becomes effective. When a reduction in force is caused by circumstances not reasonably foreseeable, the Secretary, at the request of a Component head or designee, may approve a notice period of less than 60 days. The shortened notice period must cover at least 30 full days before the effective date of release. The content of the notice will be prescribed in implementing issuances.

§ 9901.610 Voluntary separation.

(a) The Secretary may—

(1) Separate from the service any employee who volunteers to be separated even though the employee is not otherwise subject to separation due to a reduction in force; and

(2) For each employee voluntarily separated under paragraph (a)(1) of this section, retain an employee in a similar position who would otherwise be separated due to a reduction in force.

(b) The separation of an employee under paragraph (a) of this section will be treated as an involuntary separation due to a reduction in force.

§ 9901.611 Reduction in force appeals.

(a) An employee who believes the provisions of this subpart were not properly applied may appeal the reduction in force action to the Merit Systems Protection Board as provided for in 5 CFR 351.901 if the employee was—

(1) Separated by reduction in force;

(2) Reduced in band by reduction in force; or

(3) Furloughed by reduction in force under § 9901.604(b)(3).

(b) Paragraph (a) of this section does not apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

Subpart G—Adverse Actions

General

§ 9901.701 Purpose.

This subpart contains regulations prescribing the requirements for employees who are removed, suspended, furloughed for 30 days or less, reduced in pay, or reduced in pay band (or comparable reduction). The Secretary may prescribe implementing issuances to carry out the provisions of this subpart.

§ 9901.702 Waivers.

With respect to any category of employees covered by this subpart, subchapters I and II of 5 U.S.C. chapter 75, in addition to those provisions of 5 U.S.C. chapter 43 specified in subpart D of this part, are waived and replaced by this subpart.

§ 9901.703 Definitions.

In this subpart:

Adverse action means a removal, suspension, furlough for 30 days or less, reduction in pay, or reduction in pay band (or comparable reduction).

Band has the meaning given that term in § 9901.103.

Day has the meaning given that term in § 9901.103.

Furlough has the meaning given that term in § 9901.103.

Indefinite suspension means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or other administrative action. An indefinite suspension continues for an indeterminate period of time and ends with the occurrence of pending conditions set forth in the notice of actions which may include the completion of any subsequent administrative action.

Initial probationary period has the meaning given that term in § 9901.103.

In-service probationary period has the meaning given that term in § 9901.103.

Mandatory removal offense (MRO) has the meaning given that term in § 9901.103.

Reduction in pay means a decrease in an employee's rate of basic pay fixed by

law or administrative action for the position held by the employee before any deductions and exclusive of additional pay of any kind. Basic pay does not include local market supplements under subpart C of this part or similar payments. Nonreceipt of a pay increase is not a reduction in pay.

Removal means the involuntary separation of an employee from the Federal service.

Suspension means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

§ 9901.704 Coverage.

(a) *Actions covered.* This subpart covers removals, suspensions, furloughs of 30 days or less, reductions in pay, or reductions in band (or comparable reductions).

(b) *Actions excluded.* This subpart does not cover—

(1) An action taken against an employee during an initial probationary period established under § 9901.512(a), except when the employee is a preference eligible who has completed 1 year of that probationary period;

(2) A reduction in pay or pay band of an employee who does not satisfactorily complete an in-service probationary period under § 9901.512(b) if the employee is returned to a grade or band and rate of basic pay no lower than that held before the in-service probationary period.

(3) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position in a comparable pay band, if the employee was informed that the promotion was to be of limited duration;

(4) A reduction in force action under subpart F of this part;

(5) An action imposed by the Merit Systems Protection Board under 5 U.S.C. 1215;

(6) A voluntary action by an employee;

(7) An action taken or directed by OPM based on suitability under 5 CFR part 731;

(8)(i) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(ii) Termination of appointment before the expiration date specified as a basic condition of employment at the time the appointment was made, except when the termination is taken against—

(A) A preference eligible employee who has completed 1 year under a time-limited appointment; or

(B) An employee who has completed a probationary period under a term appointment;

(9) Cancellation of a promotion to a position not classified prior to the promotion;

(10) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(11) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(12) An action taken under a provision of statute, other than one codified in title 5, U.S. Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart;

(13) A classification determination, including a classification determination under subpart B of this part;

(14) Suspension or removal under 5 U.S.C. 7532; and

(15) An action to terminate grade retention upon conversion to the NSPS pay system established under subpart C of this part.

(c) *Employees covered.* Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to DoD employees, except as excluded by paragraph (d) of this section.

(d) *Employees excluded.* This subpart does not apply to—

(1) An employee who is serving a probationary period, except when the employee is a preference eligible who has completed 1 year of that probationary period;

(2) A member of the Senior Executive Service;

(3) An employee who is terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(4) An employee whose appointment is made by and with the advice and consent of the Senate;

(5) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by—

(i) The President, for a position that the President has excepted from the competitive service;

(ii) OPM, for a position that OPM has excepted from the competitive service; or

(iii) The President or the Secretary for a position excepted from the competitive service by statute;

(6) An employee whose appointment is made by the President;

(7) A reemployed annuitant who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund;

(8) An employee who is an alien or non-citizen occupying a position outside the United States, as described in 5 U.S.C. 5102(c)(11);

(9) A member of the National Security Labor Relations Board;

(10) A non-appropriated fund employee;

(11) A National Guard technician who is employed under 32 U.S.C. 709; and

(12) An employee against whom an adverse personnel action is taken or imposed under any statute or regulation other than this subpart.

Requirements for Removal, Suspension, Furlough of 30 Days or Less, Reduction in Pay, or Reduction in Band (or Comparable Reduction)

§ 9901.711 Standard for action.

The Secretary may take an adverse action under this subpart only for such cause as will promote the efficiency of the service.

§ 9901.712 Mandatory removal offenses.

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's national security mission. Such offenses will be identified in advance in implementing issuances, publicized upon establishment via notice in the **Federal Register,** and made known to all employees on a periodic basis, as appropriate, through means determined by the Secretary.

(b) The procedures in §§ 9901.713 through 9901.716 apply to actions taken under this section. However, a proposed notice required by § 9901.714 may be issued to the employee in question only after the Secretary's review and approval.

(c) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty on his or her own initiative or at the request of the employee in question.

(d) Nothing in this section limits the discretion of the Secretary to remove employees for offenses other than those identified by the Secretary as an MRO.

§ 9901.713 Procedures.

An employee against whom an adverse action is proposed is entitled to the following:

(a) A proposal notice under § 9901.714;

(b) An opportunity to reply under § 9901.715; and

(c) A decision notice under § 9901.716.

§ 9901.714 Proposal notice.

(a) *Notice period.* An employee will receive a minimum of 15 days advance

written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the notice period may be shortened to a minimum of 5 days. No notice of proposed action is necessary for furlough without pay due to unforeseen circumstances, such as sudden breakdown in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(b) *Contents of notice.* (1) The proposal notice will inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the evidence supporting the proposed action. Evidence may not be used that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given category and/or organizational unit are being furloughed, the proposal notice will state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(c) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, if it is determined that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, adversely impact the Department's mission, or otherwise jeopardize legitimate Government interests, one or a combination of the following alternatives may be taken:

(1) Assign the employee to duties where it is determined that the employee is no longer a threat to the employee or others, the Department's mission, or Government property or interests;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

§ 9901.715 Opportunity to reply.

(a) An employee will be provided a minimum of 10 days, which will run concurrently with the notice period, to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the reply period may be reduced to a minimum 5 days, which will run concurrently with the notice period. No opportunity to reply is necessary for furlough without pay due to unforeseen circumstances, such as sudden breakdown in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply period, the employee will be provided a reasonable amount of official time to review the evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) An official will be designated to receive the employee's written and/or oral response. The official will have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or non-Federal employee representative, at the employee's expense, or other representative of the employee's choice, subject to paragraph (f) of this section. The employee will provide a written designation of his or her representative.

(f) An employee's representative may be disallowed if the representative is—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes consideration of any medical condition that may be relevant to the proposed adverse action will provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) A medical examination may be required or offered pursuant to 5 CFR part 339, subpart C, when an employee's medical documentation is under consideration.

(3) Withdrawal or delay of a proposed adverse action is not required when an employee's medical condition is under consideration . However—

(i) The employee will be allowed to provide medical documentation during the opportunity to reply;

(ii) Compliance with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules will occur; and

(iii) Compliance with 5 CFR 831.1205 or 844.202, as applicable, will occur in the issuance of a decision to remove.

§ 9901.716 Decision notice.

(a) Any reasons for the action other than those specified in the proposal notice may not be considered in a decision on a proposed adverse action.

(b) Any response from the employee and the employee's representative, if the response is provided to the official designated under § 9901.715(d) during the opportunity to reply period, and any medical documentation furnished under § 9901.715(g) will be considered.

(c) The decision notice will specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts H or I of this part.

(d) To the extent practicable, the notice to the employee will be delivered on or before the effective date of the action. If delivery cannot be made to the employee in person, the notice may be delivered to the employee's last known address of record on or before the effective date of the action.

§ 9901.717 Departmental record.

(a) *Document retention.* The Department will keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record will include the following:

(1) A copy of the proposal notice;

(2) The employee's written response, if any, to the proposal;

(3) A summary of the employee's oral response, if any;

(4) A copy of the decision notice; and

(5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department will make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board (MSPB), but not less than 15 days after such a request.

Savings Provision

§ 9901.721 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Subpart H—Appeals

§ 9901.801 Purpose.

This subpart implements the provisions of 5 U.S.C. 9902(h), which establishes the process for Department employees to appeal certain adverse actions covered under subpart G of this part.

§ 9901.802 Applicable legal standards and precedents.

In accordance with 5 U.S.C. 9902(h)(3), in applying existing legal standards and precedents, MSPB and arbitrators, in applicable cases, are bound by the legal standard set forth in § 9901.107(a)(2).

§ 9901.803 Waivers.

When a specified category of employees is covered by an appeals process established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The provisions of 5 U.S.C. 7702 are modified as provided in § 9901.809. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB will follow the provisions in this subpart until it issues conforming regulations, which may not conflict with this part.

§ 9901.804 Definitions.

In this subpart:

Administrative judge or *AJ* means the official, including an administrative law judge, authorized by MSPB to hold a hearing in a matter covered by this subpart and subpart G of this part, or to decide such a matter without a hearing.

Class appeal means an appeal brought by a representative(s) of a group of similarly situated employees consistent with the provisions of Rule 23 of the *Federal Rules of Civil Procedure.*

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

Mandatory removal offense (MRO) has the meaning given that term in § 9901.103.

MSPB means the Merit Systems Protection Board.

Petition for Review (PFR) means a request for full MSPB review of a final Department decision.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Request for Review (RFR) means a preliminary request for review of an initial decision of an MSPB administrative judge before that decision has become a final Department decision.

§ 9901.805 Coverage.

(a) Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to employees in DoD organizational and functional units that are included under NSPS who appeal removals; suspensions for more than 14 days, including indefinite suspensions; furloughs of 30 days or less; reductions in pay; or reductions in pay band (or comparable reductions), which constitute appealable adverse actions for the purpose of this subpart, provided such employees are covered by § 9901.704.

(b) This subpart does not apply to a reduction in force action taken under subpart F of this part, nor does it apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

(c) Appeals of suspensions of 14 days or less and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(d) The appeal rights in 5 CFR 315.806 apply to the termination of an employee in the competitive service while serving a probationary period.

(e) Actions taken under 5 U.S.C. 7532 are not appealable to MSPB.

(f) Except as expressly provided in subpart C of this part, actions taken under that subpart are not appealable to MSPB.

§ 9901.806 Alternative dispute resolution.

The Secretary recognizes the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based problem-solving to address employee-employer disputes arising in the workplace, including those which may involve disciplinary or adverse actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The use of alternative dispute resolution is encouraged. Such methods will be subject to collective bargaining to the extent permitted by subpart I of this part.

§ 9901.807 Appellate procedures.

(a) *General.* (1) A covered Department employee may appeal to MSPB an adverse action listed in § 9901.805(a). Such an employee has a right to be represented by an attorney or other representative of his or her own choosing. The procedures in this subpart do not apply when the action is taken under the special national security provisions established by 5 U.S.C. 7532.

(2)(i) This section modifies MSPB's appellate procedures with respect to appeals under this subpart, as applicable.

(ii) MSPB will refer appeals to an AJ for adjudication. The AJ must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(3) The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(4) If the AJ is of the opinion that an appeal could be processed more expeditiously without adversely affecting any party, the AJ may—

(i) Consolidate appeals filed by two or more appellants; or

(ii) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(5) If an employee has been removed under subpart G of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

(6) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of a decision under subpart G of this part, whichever is later.

(7) Either party may file a motion to disqualify a party's representative at any time during the proceedings.

(b) *Case suspension.* Requests for case suspensions must be submitted jointly by the parties.

(c) *Settlement.* (1) An MSPB AJ may not require any party to engage in settlement discussions in connection with any action appealed under this section. Where the parties voluntarily agree to enter into settlement discussions under paragraph (c)(2) of

this section, if either party decides that such discussions are not appropriate, the matter will proceed to adjudication.

(2) Where the parties agree to engage in formal settlement discussions, these discussions will be conducted by an official other than the AJ assigned to adjudicate the case. Nothing prohibits the parties from engaging in settlement discussions on their own.

(d) *Discovery.* The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(1) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(2) Neither party may submit more than one set of interrogatories, one set of requests for production, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(3) The AJ may grant a party's motion for additional discovery only upon a showing of necessity and good cause.

(e) *Hearing.* (1) *Burden of proof.* An adverse action taken against an employee will be sustained by the MSPB AJ if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) That there was harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(2) *Decisions without a hearing.* If the AJ determines upon his or her own initiative or upon request by either party that some or all material facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing, including filing evidence and/or arguments, within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

(f) *Initial decision.* (1) *Time limit.* An initial decision must be made by an AJ no later than 90 days after the date on which the appeal is filed.

(2) *Mitigation.* (i) An AJ will give great deference to the determination regarding the penalty imposed.

(ii) An AJ may not modify the penalty imposed unless such penalty is totally unwarranted in light of all pertinent circumstances. In evaluating the appropriateness of the penalty, the AJ will give primary consideration to the impact of the sustained misconduct or poor performance on the Department's national security mission in accordance with § 9901.107(a)(2).

(iii) In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s).

(iv) When a penalty is mitigated, the maximum justifiable penalty must be applied. The maximum justifiable penalty is the severest penalty that is not so disproportionate to the basis for the action as to be totally unwarranted in light of all pertinent circumstances.

(v) If the adverse action is based on an MRO, the penalty may only be mitigated as prescribed in § 9901.808.

(3) *Reviewing charges.* Neither the MSPB AJ, nor the full MSPB, may reverse an action based on the way in which the charge is labeled or the conduct characterized, provided the employee has sufficient notice to respond to the charge.

(4) *Performance expectations.* Neither the MSPB AJ, nor the full MSPB, may reverse an action based on the way a performance expectation is expressed, provided that the expectation would be clear to a reasonable person.

(5) *Interim relief.* Pursuant to 5 U.S.C. 9902(h)(4), employees will not be granted interim relief, nor will an action taken against an employee be stayed, unless specifically ordered by the full MSPB following final decision by the Department.

(i) If the interim relief ordered by the full MSPB provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Secretary determines, in his or her sole, exclusive, and unreviewable discretion, that the employee's return to the workplace is impracticable or the presence of the employee is unduly disruptive to the work environment, the employee may be placed in an alternative position, or may be placed on excused absence pending final disposition of the employee's appeal.

(ii) Nothing in paragraph (f)(5) of this section may be construed to require that any award of back pay or attorney fees be paid before an MSPB decision becomes final.

(6) *Attorney fees.* (i) Except as provided in paragraph (f)(6)(ii) of this section or as otherwise provided by law, the AJ may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the AJ determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(ii) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(g) *Department's final decision.* (1) *Request for Review.* The initial AJ decision will become the Department's final decision 30 days after its issuance, unless either party files an RFR with MSPB and the Department concurrently (with service on the other party) within that 30-day period in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart. If a party does not submit an RFR within the above time limit, the RFR will be dismissed as untimely filed unless a good reason for the delay is shown.

(2) *Department review process.* (i) Thirty days after the timely filing of an RFR, the initial AJ decision will become the Department's final, nonprecedential decision, unless notice is served on the parties and MSPB within that 30-day period that the Department will act on the RFR. When no such notice is served, MSPB will docket and process a party's RFR as a petition for full MSPB review in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart. Timeframes will be established in implementing issuances for those instances where action is taken on an RFR.

(ii) If a decision is made to act on the RFR, the other party to the case will be provided 15 days to respond to the RFR. An extension to the filing period may be granted for good cause. After receipt of a timely response to the RFR—

(A) If a determination is made that there has been a material error of fact, or that there is new and material evidence available that, despite due diligence, was not available when the record closed, the matter will be remanded to the assigned AJ for further adjudication or a final DoD decision will be issued modifying or reversing

that initial decision or decision after remand. Any remand will be served on all parties with an opportunity for those parties to comment to the AJ. An AJ decision after remand must be made no later than 30 days after the date of receipt of the remand. However, if the Department's remand order includes instructions to hold a hearing, the AJ decision will be made not later than 45 days after receipt of the remand order. Decisions on remand will be treated as initial decisions for purpose of further review.

(B) Where it is determined that the initial AJ decision has a direct and substantial adverse impact on the Department's national security mission, or is based on an erroneous interpretation of law, Governmentwide rule or regulation, or this part, a final DoD decision will be issued modifying or reversing that initial decision; or

(C) Where it is determined that the initial AJ decision should serve as precedent, a final DoD decision will be issued affirming that initial decision for such purposes.

(3) *Precedential effect.* Any decision issued by the Department after reviewing an initial AJ decision is precedential unless—

(i) The Secretary determines that the DoD decision is not precedential; or

(ii) The final DoD decision is reversed or modified by the full MSPB.

(4) *Publication of decisions.* Precedential DoD decisions will be published. Further details regarding the publication of DoD precedential decisions will be provided in implementing issuances.

(h) *Appeal of Department's final decision.* (1) *OPM Petition for Review.* Any decision under paragraph (a)(2) of this section is final unless a party to the appeal or the Director of OPM petitions the full MSPB for review within 30 days. The Director, after consultation with the Secretary, may petition the full MSPB for review if the Director believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(2) *Petition for Review.* (i) Upon receipt of a final DoD decision issued under paragraph (g)(2)(ii) of this section, an employee or OPM may file a PFR with the full MSPB within 30 days in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(ii) The Board may dismiss any petition that, in the view of the Board, does not raise substantial questions of fact or law.

(iii) The full MSPB may order corrective action only if the Board determines that the decision was—

(A) Arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) Obtained without procedures required by law, rule, or regulation having been followed; or

(C) Unsupported by substantial evidence.

(iv) Upon receipt of a petition for full MSPB review or an RFR that becomes a PFR as a result of the expiration of the Department's review period in accordance with paragraph (g)(2)(i) of this section, the other party to the case and/or OPM, as applicable, will have 30 days to file a response to the petition. The full MSPB will act on a PFR within 90 days after receipt of a timely response, or the expiration of the response period, as applicable, in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(3) *Request for reconsideration of final MSPB decision.* The Director of OPM, after consultation with the Secretary, may seek reconsideration by MSPB of a final MSPB decision in accordance with 5 U.S.C. 7703(d), which is modified for this purpose. The Director of OPM must seek reconsideration within 35 days after the date of service of the Board's final order. If the Director seeks such reconsideration, the full MSPB must render its decision no later than 60 days after receipt of a response to OPM's petition in support of such reconsideration. The full MSPB must state the reasons for its decision.

(4) *Failure of MSPB to meet deadlines.* Failure of MSPB to meet the deadlines imposed by paragraphs (f)(1), (h)(2)(iv), and (h)(3) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party. If the AJ or full MSPB fails to meet the above time limits, the full MSPB will inform the Secretary in writing of the cause of the delay and will recommend future actions to remedy the problem.

(i) *Judicial review.* The Secretary or an employee adversely affected by a final order or decision of MSPB may seek judicial review under 5 U.S.C. 9902(h)(6).

§ 9901.808 Appeals of mandatory removal actions.

(a) Procedures for appeals of adverse actions to MSPB based on MROs will be the same as for other offenses except as otherwise provided by this section.

(b) If one or more MROs are sustained, the MSPB AJ may not mitigate the penalty.

(c) Only the Secretary may mitigate the penalty within the Department.

(d) If the MSPB AJ or the full MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, a subsequent proposed adverse action (other than an MRO) based in whole or in part on the same or similar evidence is not precluded.

§ 9901.809 Actions involving discrimination.

(a) In considering any appeal of an action filed under 5 U.S.C. 7702, the Board will apply the provisions of 5 U.S.C. 9902 and this part.

(b) In any appeal of an action filed under 5 U.S.C. 7702 that results in a final Department decision, if no petition for review of the Department's decision is filed with the full Board, and if requested by the appellant, the Department will refer only the discrimination issue to the full Board for adjudication.

(c) All references in 5 U.S.C. 7702 to 5 U.S.C. 7701 are modified to read 5 CFR part 9901, subpart H.

§ 9901.810 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Subpart I—Labor-Management Relations

§ 9901.901 Purpose.

This subpart contains the regulations which implement the provisions of 5 U.S.C. 9902(m) relating to the Department's labor-management relations system. This labor management relations system addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission and promotes a collaborative issue-based approach to labor management relations. These regulations recognize the rights of DoD employees to organize and bargain collectively, as provided for in 5 U.S.C. 9902 and this part and subject to any exclusion from coverage or limitation on the scope of bargaining pursuant to law, including this part, issuances, and implementing issuances, applicable Presidential issuances (*e.g.,* Executive orders), and any other applicable legal authority.

§ 9901.902 Scope of authority.

When a specified category of employees is covered by the labor-management relations system established under this subpart, the provisions of 5 U.S.C. 7101 through 7135 are modified and replaced by the

provisions in this subpart with respect to that category, except as otherwise specified in this subpart. Implementing issuances may be prescribed to carry out the provisions of this subpart.

§ 9901.903 Definitions.

In this subpart:

Authority means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

Board means the National Security Labor Relations Board established by this subpart.

Collective bargaining means the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to bargain in a good faith effort to reach agreement, pursuant to 5 U.S.C. 9902 and this subpart, with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Collective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to the provisions of 5 U.S.C. 9902 and this subpart.

Component means an organizational unit so prescribed and designated by the Secretary in his or her sole and exclusive discretion, such as, for example, the Office of the Secretary of Defense, a Military Department, a Defense Agency, or a DoD Field Activity.

Conditions of employment means personnel policies, practices, and matters affecting working conditions—whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

(1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;

(2) The classification of any position, including any classification determinations under subpart B of this part;

(3) The pay of any employee or for any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or

(4) Any matters specifically provided for by Federal statute.

Confidential employee means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

Consult means to consider the interests, opinions, and recommendations of a recognized labor organization in rendering decisions. This can be accomplished in face-to-face meetings or through other means, *e.g.,* teleconferencing, e-mail, and written communications.

Dues means dues, fees, and assessments.

Exclusive representative means any labor organization which is recognized as the exclusive representative of employees in an appropriate unit consistent with the Department's organizational structure, pursuant to 5 U.S.C. 7111 or as otherwise provided by § 9901.911.

FMCS means Federal Mediation and Conciliation Service.

Grade means a level of work under a position classification or job grading system.

Grievance means any complaint—

(1) By any employee concerning any matter relating to the conditions of employment of the employee;

(2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or

(3) By any employee, labor organization, or the Department concerning—

(i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, regulation, or issuance issued for the purpose of affecting conditions of employment.

Implementing issuance or issuances has the meaning given that term in § 9901.103.

Issuance or issuances means a document issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments to carry out a policy or procedure of the Department other than those issuances implementing this part.

Labor organization has the meaning given that term in § 9901.103.

Management official means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department.

Person has the meaning given that term in 5 U.S.C. 7103(a)(1).

Professional employee has the meaning given that term in 5 U.S.C. 7103(a)(15).

Supervisor means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees; to adjust their grievances; or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term ''supervisor'' includes only those individuals who devote a preponderance of their employment time to exercising such authority. It also means an individual employed by the Department who exercises supervisory authority over military members of the armed services, such as directing or assigning work or evaluating or recommending evaluations.

§ 9901.904 Coverage.

(a) *Employees covered.* This subpart applies to eligible DoD employees, subject to a determination by the Secretary under § 9901.102(b)(1), except as provided in paragraph (b) of this section. DoD employees who would otherwise be eligible for bargaining unit membership under 5 U.S.C. chapter 71, as modified by § 9901.912, are eligible for bargaining unit membership under this subpart. In addition, this subpart applies to an employee whose employment in the Department has ceased because of any unfair labor practice under § 9901.916 of this subpart and who has not obtained any other regular and substantially equivalent employment.

(b) *Employees excluded.* This subpart does not apply to—

(1) An alien or noncitizen of the United States who occupies a position outside the United States;

(2) A military member of the armed services;

(3) A supervisor or a management official;

(4) Any person who participates in a strike in violation of 5 U.S.C. 7311; or

(5) Any employee excluded pursuant to § 9901.912 or any other legal authority.

§ 9901.905 Impact on existing agreements.

(a) Any provision of a collective bargaining agreement that is inconsistent with this part and/or implementing issuances is unenforceable on the effective date of the applicable subpart(s) or such issuances. The exclusive representative may appeal a determination that a provision is unenforceable to the

National Security Labor Relations Board in accordance with the procedures and time limits pursuant to § 9901.908 and the Board's regulations. However, the Secretary, in his or her sole and exclusive discretion, may continue all or part of a particular provision(s) with respect to a specific category or categories of employees and may cancel such continuation at any time; such determinations are not precedential.

(b) Upon request by an exclusive representative, the parties will have 60 days after the effective date of coverage under the applicable subpart and/or implementing issuance to bring into conformance those remaining negotiable collective bargaining agreement provisions directly affected by the collective bargaining agreement provisions rendered unenforceable by the applicable subpart and/or implementing issuance. During that period, the parties may utilize the negotiation impasse provisions of § 9901.920 to assist in resolving any impasses.

(c) Any provision of a collective bargaining agreement that is inconsistent with an issuance remains in effect until the expiration, renewal, or extension of the term of the agreement, whichever occurs first.

§ 9901.906 Employee rights.

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee will be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this subpart.

§ 9901.907 National Security Labor Relations Board.

(a) The Secretary has sole, exclusive, and unreviewable authority to determine the effective date for the establishment of the National Security Labor Relations Board.

(b)(1) The National Security Labor Relations Board is composed of at least three members who are appointed by the Secretary for terms of 3 years, except that the appointments of the initial Board members will be for terms of 1, 2, and 3 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for up to two additional 1-year terms. The Secretary, in his or her sole and exclusive discretion, may appoint additional members to the Board; in so doing, he or she will make such appointments to ensure that the Board consists of an odd number of members.

(2) Members of the Board will be independent, distinguished citizens of the United States who are well known for their integrity, impartiality, and expertise in labor relations, and/or the DoD mission and/or other related national security matters, and will be able to acquire and maintain an appropriate security clearance. Members may be removed by the Secretary only for inefficiency, neglect of duty, or malfeasance in office.

(3) An individual chosen to fill a vacancy on the Board will be appointed for the unexpired term of the member who is replaced and, at the Secretary's option, an additional term or terms.

(c) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the NSLRB.

(d) *Appointment procedures for non-Chair NSLRB members.* (1) The appointments of the two non-Chair NSLRB members will be made by the Secretary, at his or her sole and exclusive discretion, after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint NSLRB members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requires established by the Secretary.

(e) *Appointment of additional non-Chair NSLRB members.* If the Secretary determines that additional members are needed, he or she may, subject to the criteria set forth in paragraph (b)(2) of this section, appoint the additional members according to the procedures established by paragraph (d) of this section.

(f) A Board vacancy will be filled according to the procedure used to appoint the member whose position was vacated.

(g)(1) The Board will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases, including standards for asserting or declining jurisdiction.

(2) To the extent practicable, the Board will use a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. The Board may, pursuant to its regulations, use a combination of mediation, factfinding, and any other appropriate dispute resolution methods to resolve all such disputes at the earliest practicable time and with a minimum administrative burden.

(3) A vote of the majority of the Board (or a three-person panel of the Board) will be final. A vacancy on the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The vote of the Chair will be dispositive in the event of a tie.

(h) Decisions of the Board are final and binding.

§ 9901.908 Powers and duties of the Board.

(a) Section 9902(m)(6) of title 5, U.S. Code, requires that the labor relations system established under this subpart provide for an independent third party review of labor relations issues set out in § 9901.908(b), including defining the third party to provide the review. Notwithstanding § 9901.907 and pending establishment of the Board, the Secretary, in consultation with the Director, may designate a third party to exercise the authority of the Board in accordance with this subpart.

(b) The Board may to the extent provided in this subpart and in accordance with regulations prescribed by the Board—

(1) Conduct investigations and hearings, and resolve allegations of unfair labor practices, including allegations concerning strikes, work stoppages, slowdowns, and picketing, or condoning such activity by failing to take action to prevent or stop such activity;

(2) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9901.917;

(3) Resolve exceptions to arbitration awards. In doing so, the Board will conduct any review of an arbitral award in accordance with 5 U.S.C. 7122(a) as modified in § 9901.923;

(4) Resolve negotiation impasses in accordance with § 9901.920;

(5) Conduct *de novo* review involving all matters within the Board's jurisdiction; and

(6) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue, but in no case may the Board issue status quo ante remedies, where such remedies are not intended to cure egregious violations of this subpart or where such an award would impose an economic hardship or interfere with the efficiency or effectiveness of the Department's mission or impact national security.

(c) In any case in which the Board or its authorized agent, in the Board's or the agent's unreviewable discretion, declines to adjudicate any unfair labor practice allegation(s) because the allegation(s) was not timely filed, fails to state an unfair labor practice, or for other appropriate reasons, the Board or the agent, as applicable, will provide the person making the allegation(s) a written statement of the reasons for such determination.

(d) Upon the request of a DoD Component or a labor organization concerned, the Board may issue guidance for matters within its jurisdiction.

(e) The Board's decisions will be written and published.

§ 9901.909 Powers and duties of the Federal Labor Relations Authority.

(a) To the extent provided in this subpart (pursuant to the authority in 5 U.S.C. 9902), the Federal Labor Relations Authority, in accordance with conforming regulations prescribed by the Authority, may—

(1) Determine the appropriateness of bargaining units pursuant to the provisions of § 9901.912;

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer 5 U.S.C. 7111 (relating to the according of exclusive recognition to labor organizations), which is not waived for the purpose of this subpart;

(3) Resolve disputes regarding the granting of national consultation rights; and

(4) Upon request of a party, review only those Board decisions on—

(i) Unfair labor practices, except those issued under § 9901.908(c);

(ii) Arbitral awards under § 9901.908; and

(iii) Negotiability disputes.

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party will timely raise the issue with the Authority and simultaneously file a copy of its response with the Board in accordance with regulations established by the Authority. The Authority will promptly transfer the case to the Board, which will determine whether the matter is within the Board's jurisdiction. If the Board determines that the matter is not within its jurisdiction, the Board will return the matter to the Authority for a decision on the merits of the case. The Board's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority. The Authority will promptly decide those cases that the Board has determined are within the jurisdiction of the Authority.

(c)(1) To obtain review by the Authority of a Board decision, a party will request a review of the record of a Board decision by the Authority by filing such a request in writing within 15 days after the issuance of the decision. A copy of the request will be served on all parties. Within 15 days after service of the request, any response will be filed. The Authority will establish, in conjunction with the Board, standards for the sufficiency of the record and other procedures, including notice to the parties. The Authority will accept the findings of fact and interpretations of this part made by the Board and sustain the Board's decision unless the requesting party shows that the Board's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the Board's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) The Authority will complete its review of the record and issue a final decision within 30 days after receiving the party's response to such request for review. If the Authority does not issue a final decision within this mandatory time limit, the Authority will be considered to have denied the request for review of the Board's decision, which will constitute a final decision of the Authority and is subject to judicial review in accordance with 5 U.S.C. 7123.

(d) Judicial review of any Authority decision is as prescribed in 5 U.S.C. 7123(a). The references in 5 U.S.C. 7123(a) to other provisions in 5 U.S.C. chapter 71 are considered to be references to those particular provisions as modified by this subpart.

§ 9901.910 Management rights.

(a) Subject to paragraphs (b) through (e) of this section, nothing in this subpart may affect the authority of any management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, pay schedules, pay bands and/or grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend; remove; reduce in pay, pay band, or grade; or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this section.

(c) Notwithstanding paragraph (b) of this section, the Secretary in his or her sole, exclusive, and unreviewable discretion, may authorize bargaining over the procedures that will be observed in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this section. This authorization will be based on a determination by the Secretary, in his or her sole, exclusive, and unreviewable discretion, that bargaining is necessary to advance the Department's mission or promote organizational effectiveness. Any specific authorization remains in effect until an agreement is reached or management withdraws from negotiations, whichever occurs first.

(d) Unless the Secretary elects to bargain under paragraph (c) of this section, management will consult at the request of an exclusive representative as required under § 9901.917 over the procedures that will be observed in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this

section. Consultation does not require that the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for FMCS or another third party to assist in this process. Neither the Board nor the Authority may intervene in this process.

(e) If an obligation exists under § 9901.917 to bargain or consult regarding any authority under paragraph (a) of this section, management will provide notice to the exclusive representative concurrently with the exercise of that authority. However, at its sole, exclusive, and unreviewable discretion, management may provide notice to an exclusive representative of its intention to exercise an authority under paragraph (a) of this section as far in advance as practicable. Further, nothing in paragraph (e) of this section establishes an independent right to bargain or consult.

(f) When an obligation exists under § 9901.917, management will provide notice to the exclusive representative and an opportunity to present its views and recommendations regarding the exercise of an authority under paragraph (a) of this section, and the parties will bargain at the level of recognition (unless otherwise delegated below that level, at their mutual agreement, or as provided for in §§ 9901.917 and 9901.918) over otherwise negotiable—

(1)(i) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(ii) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraphs (a)(1) and (a)(2) of this section. Appropriate arrangements within the duty to bargain include proposals on matters such as personal hardships and safety measures.

(2) Appropriate arrangements within the duty to bargain do not include proposals on matters such as the routine assignment to specific duties, shifts, or work on a regular or overtime basis except when the Secretary in his or her sole, exclusive, and unreviewable discretion authorizes such bargaining. This authorization will be based on a determination by the Secretary, in his or her sole, exclusive, and unreviewable discretion, that bargaining is necessary to advance the Department's mission or promote organizational effectiveness. Any specific authorization remains in effect until an agreement is reached or management withdraws from negotiations, whichever occurs first.

(g) Where a proposal falls within the coverage of both paragraph (a)(1) and (a)(3) of this section or paragraph (a)(2) and (a)(3) of this section, the matter will be determined to be covered by paragraph (a)(1) or (a)(2) of this section for the purpose of collective bargaining.

(h) Any mid-term agreements, reached with respect to paragraphs (c), (f)(1)(ii), or (f)(2) of this section will not be precedential or binding on subsequent acts, or retroactively applied, except at the Secretary's sole, exclusive, and unreviewable discretion.

(i) Nothing will delay or prevent the Secretary from exercising his or her authority under this subpart.

§ 9901.911 Exclusive recognition of labor organizations.

Exclusive recognition will be accorded to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees, in an appropriate unit as determined by the Authority, who cast valid ballots in the election.

§ 9901.912 Determination of appropriate units for labor organization representation.

(a) The Authority will determine the appropriateness of any unit. The Authority will determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this subpart, the appropriate unit should be established on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure and § 9901.107(a).

(b) A unit may not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), which is not waived for the purpose of this subpart, any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subpart;

(5) Both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law or this subpart relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such provision or subpart applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision or subpart applies.

(d) Two or more units in the Department for which a labor organization is the exclusive representative may, upon petition by the Secretary or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority will certify the labor organization as the exclusive representative of the new larger unit.

§ 9901.913 National consultation.

(a) If, in connection with the Department or Component, no labor organization has been accorded exclusive recognition on a Department or Component basis, a labor organization that is the exclusive representative of a substantial number of the employees of the Department or Component, as determined in accordance with criteria prescribed by the Authority, will be granted national consultation rights by the Department or Component. National consultation rights will terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights will be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any Department or Component under subsection (a) of this section will—

(i) Be informed of any substantive change in conditions of employment